

# Exhibit 3

## Transcript of the Deposition of Justin Anderson



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# Transcript of Justin Anderson, PhD

**Date:** July 27, 2021

**Case:** Elevate Federal Credit Union -v- Elevations Credit Union

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Transcript of Justin Anderson, PhD  
Conducted on July 27, 2021

1 (1 to 4)

1	<p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE DISTRICT OF UTAH</p> <p>3 - - - - - x</p> <p>4 ELEVATE FEDERAL :</p> <p>5 CREDIT UNION, :</p> <p>6 : Civil Action No.</p> <p>7 Plaintiff/ : 1:19-cv-00028-DAK-JCB</p> <p>8 Counterclaim :</p> <p>9 Defendant, :</p> <p>10 v. :</p> <p>11 ELEVATIONS CREDIT :</p> <p>12 UNION, :</p> <p>13 :</p> <p>14 Defendant/ :</p> <p>15 Counterclaimant. :</p> <p>16 - - - - - x</p> <p>17</p> <p>18 Deposition of JUSTIN ANDERSON, PHD</p> <p>19 Conducted Virtually</p> <p>20 Tuesday, July 27, 2021</p> <p>21 9:56 a.m. CT</p> <p>22</p> <p>23 Job No.: 384704</p> <p>24 Pages: 1 - 136</p> <p>25 Reported By: Carla S. Kimbrough</p>	3
2	<p>1 A P P E A R A N C E S</p> <p>2 ON BEHALF OF THE PLAINTIFF/COUNTERCLAIM</p> <p>3 DEFENDANT:</p> <p>4 KIRSTEN R. ALLEN, ESQUIRE</p> <p>5 FABIAN VANCOTT</p> <p>6 215 South State Street, Suite 1200</p> <p>7 Salt Lake City, Utah 84111</p> <p>8 801.531.8900</p> <p>9</p> <p>10 ON BEHALF OF THE</p> <p>11 DEFENDANT/COUNTERCLAIMANT:</p> <p>12 TIMOTHY P. GETZOFF, ESQUIRE</p> <p>13 HOLLAND &amp; HART</p> <p>14 1800 Broadway, Suite 300</p> <p>15 Boulder, Colorado 80302-5289</p> <p>16 303.473.2734</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 Matthew Weedon, Technician</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	4
2	<p>1 Deposition of JUSTIN ANDERSON, PhD, conducted</p> <p>2 virtually.</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9 Pursuant to notice, before Carla S. Kimbrough,</p> <p>10 Certified Shorthand Reporter in and for the State</p> <p>11 of Oklahoma.</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	4
2	<p>1 C O N T E N T S</p> <p>2</p> <p>3 EXAMINATION OF JUSTIN ANDERSON, PhD Page</p> <p>4 By Mr. Getzoff 5</p> <p>5</p> <p>6 E X H I B I T S</p> <p>7 (Attached to transcript)</p> <p>8 JUSTIN ANDERSON, PhD DEPOSITION EXHIBITS Page</p> <p>9 Exhibit 62 Poret Expert Report, 118</p> <p>10 March 2021</p> <p>11 Exhibit 67 Spreadsheet 119</p> <p>12 Exhibit 73 Google Searches, 91</p> <p>13 6-15-2021</p> <p>14 Exhibit 75 Expert Rebuttal Report 10</p> <p>15 Exhibit 76 The Trademark Reporter, 52</p> <p>16 May-June 2019</p> <p>17 Exhibit 77 Google Search, 96</p> <p>18 7-26-2021</p> <p>19 Exhibit 78 Spreadsheet 121</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	4

Conducted on July 27, 2021

<p style="text-align: right;">5</p> <p>1 PROCEEDINGS</p> <p>2 THE REPORTER: Will counsel please</p> <p>3 stipulate that in lieu of formally swearing in the</p> <p>4 witness, the reporter will instead ask the witness</p> <p>5 to acknowledge that their testimony will be true</p> <p>6 under the penalties of perjury, that counsel will</p> <p>7 not object to the admissibility of the transcript</p> <p>8 based on proceeding in this way, and that the</p> <p>9 witness has verified that he is in fact Dr. Justin</p> <p>10 Anderson. Counsel?</p> <p>11 MR. GETZOFF: Agree.</p> <p>12 MS. ALLEN: Agree.</p> <p>13 THE REPORTER: Dr. Anderson, do you hereby</p> <p>14 acknowledge that your testimony will be true under</p> <p>15 the penalties of perjury?</p> <p>16 THE WITNESS: I'm sorry, I didn't quite</p> <p>17 hear all that.</p> <p>18 THE REPORTER: Do you hereby acknowledge</p> <p>19 that your testimony will be true under the</p> <p>20 penalties of perjury?</p> <p>21 THE WITNESS: Yes.</p> <p>22 THE REPORTER: Thank you.</p> <p>23 EXAMINATION</p> <p>24 BY MR. GETZOFF:</p> <p>25 Q Good morning, sir. Can you please state</p>	<p style="text-align: right;">7</p> <p>1 (Break taken from 9:58 a.m. to 10:01 a.m.)</p> <p>2 (Pending question read.)</p> <p>3 <b>A I've worked here since 2014, and prior to</b></p> <p>4 <b>that I was here for about a year previously.</b></p> <p>5 MR. GETZOFF: Let's go off the record.</p> <p>6 (Off-the-record discussion due to</p> <p>7 technical difficulties.)</p> <p>8 Q (By Mr. Getzoff) Dr. Anderson, you were</p> <p>9 retained by the plaintiff in this case, Elevate</p> <p>10 Federal Credit Union. Is that correct?</p> <p>11 <b>A Yes.</b></p> <p>12 Q When were you retained in this case?</p> <p>13 <b>A I believe it was early May of this year.</b></p> <p>14 Q And who contacted you?</p> <p>15 <b>A Counsel for the plaintiff.</b></p> <p>16 Q Was it Ms. Allen?</p> <p>17 <b>A I don't recall.</b></p> <p>18 Q Do you recall which counsel contacted you?</p> <p>19 <b>A Not clearly.</b></p> <p>20 Q Had you worked on a litigation matter for</p> <p>21 the plaintiff's law firm Fabian VanCott prior to</p> <p>22 this one?</p> <p>23 <b>A No.</b></p> <p>24 Q Dr. Anderson, where are you currently</p> <p>25 sitting, what address? Are you at the address you</p>
<p style="text-align: right;">6</p> <p>1 your full name and spell your last name, please.</p> <p>2 <b>A Justin Anderson, A-N-D-E-R-S-O-N.</b></p> <p>3 Q And, Mr. Anderson, I understand you have a</p> <p>4 PhD. Do you go by Dr. Anderson?</p> <p>5 <b>A Yes.</b></p> <p>6 Q Then I will call you Dr. Anderson, and I</p> <p>7 apologize if I omit that during the deposition.</p> <p>8 Dr. Anderson, can you tell me your work</p> <p>9 address, please?</p> <p>10 <b>A 16501 Ventura Boulevard, Suite 601,</b></p> <p>11 <b>(indiscernible), California 91436.</b></p> <p>12 THE REPORTER: I'm sorry, what was the</p> <p>13 name of the town?</p> <p>14 THE WITNESS: Encino, E-N-C-I-N-O.</p> <p>15 THE REPORTER: Thank you.</p> <p>16 Q (By Mr. Getzoff) Dr. Anderson, you</p> <p>17 currently work at MMR Strategy Group?</p> <p>18 <b>A Yes.</b></p> <p>19 Q How long have you worked at MMR Strategy</p> <p>20 Group?</p> <p>21 <b>A Since 2014 and I also worked at MMR for</b></p> <p>22 <b>approximately for (indiscernible) in a previous</b></p> <p>23 <b>role.</b></p> <p>24 (Off-the-record discussion due to</p> <p>25 technical difficulties.)</p>	<p style="text-align: right;">8</p> <p>1 gave us previously?</p> <p>2 <b>A Yes, I am.</b></p> <p>3 Q Is there anyone in the room with you?</p> <p>4 <b>A No.</b></p> <p>5 Q Other than deposition exhibits that we'll</p> <p>6 be referring to during the deposition, will you</p> <p>7 agree not to review any notes, e-mails, texts, or</p> <p>8 any other communications while we are on the</p> <p>9 record?</p> <p>10 <b>A Yes.</b></p> <p>11 Q Dr. Anderson, I understand that during</p> <p>12 your time with MMR Strategy Group you've been</p> <p>13 involved in conducting litigation surveys for</p> <p>14 trademark cases. Is that accurate?</p> <p>15 <b>A Yes.</b></p> <p>16 Q And by that I mean a survey for use in a</p> <p>17 litigation concerning a trademark issue. Is</p> <p>18 that -- is your answer still yes?</p> <p>19 <b>A Yes, it is.</b></p> <p>20 Q Dr. Anderson, in your report you say that</p> <p>21 you have designed -- during your time at MMR you</p> <p>22 have designed and conducted hundreds of surveys on</p> <p>23 a variety of topics including likelihood of</p> <p>24 confusion. Is that accurate?</p> <p>25 <b>A Yes.</b></p>

Conducted on July 27, 2021

<p>9</p> <p>1 Q I want to -- I want to focus specifically</p> <p>2 on the likelihood of confusion surveys as opposed</p> <p>3 to other type of trademark surveys. And as</p> <p>4 opposed to other type of surveys that don't have</p> <p>5 to do with trademark issues at all. Can you tell</p> <p>6 me all of the surveys you have conducted in your</p> <p>7 career how many dealt, either by an estimate of</p> <p>8 number or percentage, with the likelihood of</p> <p>9 confusion?</p> <p>10 <b>A It may be more than 100. It's certainly</b></p> <p>11 <b>more than 50.</b></p> <p>12 Q Now in your expert report, Dr. Anderson,</p> <p>13 do you have a copy -- do you have a hard copy of</p> <p>14 your expert report?</p> <p>15 <b>A No.</b></p> <p>16 Q Are you able to get one? And the reason I</p> <p>17 ask is I can -- I can send it to you in PDF. And</p> <p>18 if you have a second screen you can review it on</p> <p>19 your own. But it may be easier for you to have a</p> <p>20 hard copy of your own report as we go through it.</p> <p>21 It's up to you.</p> <p>22 <b>A Why don't we try sharing a PDF. And if</b></p> <p>23 <b>that don't work, then I will be able to print a</b></p> <p>24 <b>copy.</b></p> <p>25 Q Okay. Let's do this. Let me -- let me</p>	<p>11</p> <p>1 engaged and you submitted an expert report.</p> <p>2 <b>A That's correct.</b></p> <p>3 Q I want to go through these one at a time</p> <p>4 and just ask you a couple questions about each.</p> <p>5 Are these in chronological order?</p> <p>6 <b>A I think so, yes.</b></p> <p>7 Q Okay.</p> <p>8 <b>A Reverse so that the more -- the ones at</b></p> <p>9 <b>the top are more recent.</b></p> <p>10 Q Okay. So the Gaby's Bag versus Mercari,</p> <p>11 that's the most recent case where you submitted an</p> <p>12 expert report or testified?</p> <p>13 <b>A Prior to this matter, yes, I believe so.</b></p> <p>14 Q And putting this matter aside, is this</p> <p>15 listing accurate?</p> <p>16 <b>A Sorry, can you be more specific?</b></p> <p>17 Q Yeah. Is this a complete list of all</p> <p>18 cases where you have issued an expert report or</p> <p>19 testified in the last four years?</p> <p>20 <b>A Yes, I believe so.</b></p> <p>21 Q In the Gaby's Bags case did you testify in</p> <p>22 that case?</p> <p>23 <b>A I provided an expert report. I was not</b></p> <p>24 <b>deposed or at least I haven't been deposed yet,</b></p> <p>25 <b>and the matter is still ongoing.</b></p>
<p>10</p> <p>1 mark our first exhibit, which will be -- which</p> <p>2 we'll mark as 75. We've been marking exhibits</p> <p>3 sequentially throughout the depositions, and I</p> <p>4 think we ended at 74 with Mr. Poret's.</p> <p>5 (Exhibit No. 75 was marked for</p> <p>6 identification and is attached to the transcript.)</p> <p>7 Q So, Dr. Anderson, I have just put</p> <p>8 Exhibit 75 in the chat. Can you retrieve that?</p> <p>9 <b>A I've got it.</b></p> <p>10 Q Okay. Dr. Anderson, is this the expert</p> <p>11 report that you submitted in this case?</p> <p>12 <b>A Yes, I believe so.</b></p> <p>13 Q And, Dr. Anderson, is this your signature</p> <p>14 on the last page of the body of the report,</p> <p>15 page 37?</p> <p>16 <b>A Yes.</b></p> <p>17 Q And on the very last page of the report in</p> <p>18 the appendixes at the end is a list of cases where</p> <p>19 you testified as an expert at deposition or trial</p> <p>20 in the last four years. Is that -- is that what</p> <p>21 this page reflects?</p> <p>22 <b>A Or provided an expert report. That's</b></p> <p>23 <b>correct.</b></p> <p>24 Q Okay. So some of these you didn't</p> <p>25 necessarily testify in deposition or trial but you</p>	<p>12</p> <p>1 Q And when you say -- it says retained by</p> <p>2 defendant, that doesn't always mean -- like this</p> <p>3 case, that doesn't always mean the trademark</p> <p>4 owner. Or I should say it doesn't always mean</p> <p>5 accused infringer. So I'm going to ask you just</p> <p>6 to clarify. You were retained by Mercari in that</p> <p>7 case, correct?</p> <p>8 <b>A Yes.</b></p> <p>9 Q And was Mercari being accused trademark</p> <p>10 infringement?</p> <p>11 <b>A I don't believe so.</b></p> <p>12 Q Is Mercari accusing Gaby's Bags of</p> <p>13 trademark infringement?</p> <p>14 <b>A No, I don't believe so.</b></p> <p>15 Q Is that case a trademark case?</p> <p>16 <b>A I don't believe it is.</b></p> <p>17 Q Let's go to the next case, Blackstone</p> <p>18 versus Costco. Is that a trademark case?</p> <p>19 <b>A Yes, I believe so.</b></p> <p>20 Q Did you give testimony in that case?</p> <p>21 <b>A Let me just ask you to clarify. By</b></p> <p>22 <b>testimony, what do you mean by testimony?</b></p> <p>23 Q Yeah. For all of these I know you at</p> <p>24 least gave an expert report. So that's assumed.</p> <p>25 By testimony I mean either a deposition or trial.</p>

Conducted on July 27, 2021

<p>13</p> <p>1 <b>A Okay.</b></p> <p>2 Q So for the Costco case did you give</p> <p>3 testimony in that case?</p> <p>4 <b>A Not to this date, no. That matter is also</b></p> <p>5 <b>ongoing.</b></p> <p>6 Q In that case is Costco being accused of</p> <p>7 infringement?</p> <p>8 <b>A I believe so.</b></p> <p>9 Q Did you do a survey in that case?</p> <p>10 <b>A Yes.</b></p> <p>11 Q What was the trademark that's being --</p> <p>12 what was the trademark of the plaintiff that's</p> <p>13 alleged to be infringed?</p> <p>14 <b>A It's trade dress. It's the appearance of</b></p> <p>15 <b>the product.</b></p> <p>16 Q In that case you said you did do a survey</p> <p>17 yourself, correct?</p> <p>18 <b>A Yes.</b></p> <p>19 Q Did you use an Eveready format or a Squirt</p> <p>20 format?</p> <p>21 <b>A I did not -- it was not a likelihood of</b></p> <p>22 <b>confusion survey.</b></p> <p>23 Q What kind of survey was it?</p> <p>24 <b>A Survey of measured secondary meaning.</b></p> <p>25 Q The next case, Country Life versus Hain</p>	<p>15</p> <p>1 THE WITNESS: Yes.</p> <p>2 <b>A I don't remember clearly but the -- I know</b></p> <p>3 <b>the trade dress was at issue. I don't recall</b></p> <p>4 <b>whether the trade name was also at issue.</b></p> <p>5 Q (By Mr. Getzoff) Let's go to the next</p> <p>6 case, the FTC case versus On Point Global. Was</p> <p>7 that a trademark case?</p> <p>8 <b>A No.</b></p> <p>9 Q The next case Blackboard versus AudioEye</p> <p>10 for the TTAB, that I assume was a trademark case.</p> <p>11 <b>A Yes.</b></p> <p>12 Q You were retained by AudioEye in that</p> <p>13 case?</p> <p>14 <b>A Yes.</b></p> <p>15 Q Did you perform a survey in that case?</p> <p>16 <b>A No.</b></p> <p>17 Q Did you critique the survey or a survey</p> <p>18 offered by the -- by Blackboard in that case?</p> <p>19 <b>A Yes.</b></p> <p>20 Q What was the trademark that Blackboard</p> <p>21 alleged or that Blackboard was asserting in that</p> <p>22 proceeding?</p> <p>23 <b>A I don't remember which party was asserting</b></p> <p>24 <b>the trademark. AudioEye was the applicant.</b></p> <p>25 Q Right. And so Blackboard as the</p>
<p>14</p> <p>1 Celestial Group, was that a trademark case?</p> <p>2 <b>A Yes, I believe so.</b></p> <p>3 Q Was that a likelihood of confusion --</p> <p>4 strike that.</p> <p>5 Did you do a survey in that case?</p> <p>6 <b>A No.</b></p> <p>7 Q Did you critique the survey offered by the</p> <p>8 expert for the other side?</p> <p>9 <b>A Yes.</b></p> <p>10 Q In that case you were retained by Hain</p> <p>11 Celestial. Was Hain Celestial being accused of</p> <p>12 trademark infringement?</p> <p>13 <b>A I believe so.</b></p> <p>14 Q Did the plaintiff -- plaintiff's expert do</p> <p>15 a likelihood of confusion survey?</p> <p>16 <b>A Yes.</b></p> <p>17 Q Did that survey use an Eveready format or</p> <p>18 a Squirt format?</p> <p>19 <b>A A Squirt.</b></p> <p>20 Q What was the trademark that the plaintiff</p> <p>21 alleged to be infringed in that case?</p> <p>22 <b>A I don't remember clearly. I remember</b></p> <p>23 <b>there was (indiscernible.)</b></p> <p>24 THE REPORTER: I'm sorry. I'm sorry, that</p> <p>25 was not good. Could you start that again, please?</p>	<p>16</p> <p>1 registrant typically would be saying that the</p> <p>2 applicant's mark is creating likelihood of</p> <p>3 confusion with their preexisting registration.</p> <p>4 Does that sound familiar?</p> <p>5 <b>A I don't -- the survey that I critiqued was</b></p> <p>6 <b>not a likelihood of confusion survey.</b></p> <p>7 Q Okay. What kind of survey was it?</p> <p>8 <b>A A survey to measure genericness or I</b></p> <p>9 <b>should say a survey to measure the primary</b></p> <p>10 <b>significance of the market.</b></p> <p>11 Q The next case Jacobs versus Fareportal, is</p> <p>12 that a trademark case?</p> <p>13 <b>A Yes.</b></p> <p>14 Q Did you provide -- did you a conduct a</p> <p>15 survey in that case?</p> <p>16 <b>A No.</b></p> <p>17 Q Did you critique a survey offered by the</p> <p>18 plaintiff in that case?</p> <p>19 <b>A Yes.</b></p> <p>20 Q Was that a likelihood of confusion survey?</p> <p>21 <b>A Yes.</b></p> <p>22 Q Did that survey use an Eveready or a</p> <p>23 Squirt format?</p> <p>24 <b>A I believe it was described as a Squirt</b></p> <p>25 <b>survey.</b></p>

Conducted on July 27, 2021

<p>17</p> <p>1 Q Going back to the Hain Celestial case</p> <p>2 where you critiqued the plaintiff survey which</p> <p>3 used a Squirt format, did you -- was part of your</p> <p>4 critique that the plaintiff used a Squirt format?</p> <p>5 <b>A Not that I recall.</b></p> <p>6 Q The in Jacobs v Fareportal case, was part</p> <p>7 of your critique that the plaintiff's expert used</p> <p>8 a Squirt format?</p> <p>9 <b>A I don't recall.</b></p> <p>10 Q In the next case Allergen versus</p> <p>11 Imprimis -- Imprimis Pharmaceuticals, was that a</p> <p>12 trademark case?</p> <p>13 <b>A No.</b></p> <p>14 Q Cross Trailers versus Cross Trailer, I'm</p> <p>15 going to guess that was a trademark case?</p> <p>16 <b>A Yes.</b></p> <p>17 Q Did you conduct a survey in that case?</p> <p>18 <b>A No.</b></p> <p>19 Q Did you critique a survey offered by the</p> <p>20 plaintiff in that case?</p> <p>21 <b>A Yes.</b></p> <p>22 Q Did that -- did the plaintiff expert use a</p> <p>23 Squirt format or an Eveready format?</p> <p>24 <b>A I believe it was Eveready.</b></p> <p>25 Q Then to be clear in that case you did not</p>	<p>19</p> <p>1 <b>A No.</b></p> <p>2 Q You critiqued the survey performed by the</p> <p>3 plaintiff's expert?</p> <p>4 <b>A Yes.</b></p> <p>5 Q Was that a likelihood of confusion survey?</p> <p>6 <b>A That's how it was described.</b></p> <p>7 Q That was the topic reportedly being</p> <p>8 addressed by the survey.</p> <p>9 <b>A That's right.</b></p> <p>10 Q Did the plaintiff's expert in that case</p> <p>11 use an Eveready or a Squirt format?</p> <p>12 <b>A It was not an Eveready. It would be most</b></p> <p>13 <b>closely described as a Squirt. I'm not certain</b></p> <p>14 <b>that it was a Squirt format exactly.</b></p> <p>15 Q The next case DRL Enterprises versus North</p> <p>16 Atlantic Operating Company, et al., was that a</p> <p>17 trademark case?</p> <p>18 <b>A Yes.</b></p> <p>19 Q Did you perform a survey in that case?</p> <p>20 <b>A Yes.</b></p> <p>21 Q Is that a likelihood of confusion survey?</p> <p>22 <b>A No.</b></p> <p>23 Q What kind of survey was it? What -- what</p> <p>24 were you attempting to measure in that survey?</p> <p>25 MS. ALLEN: Objection, compound. You can</p>
<p>18</p> <p>1 perform a survey yourself, right?</p> <p>2 <b>A I think you asked me that but the answer</b></p> <p>3 <b>is, no, I did not.</b></p> <p>4 Q The next case Jaguar Land Rover versus</p> <p>5 Bombardier Recreational Products, is that a</p> <p>6 trademark case?</p> <p>7 <b>A Yes.</b></p> <p>8 Q Is that a case concerning the trademark</p> <p>9 Defender?</p> <p>10 <b>A I don't recall the name.</b></p> <p>11 Q Did you perform a survey in that case?</p> <p>12 <b>A No.</b></p> <p>13 Q Did the defendant conduct -- did the</p> <p>14 defendant expert conduct a survey?</p> <p>15 <b>A Yes.</b></p> <p>16 Q And so your expert opinion critiqued that</p> <p>17 survey?</p> <p>18 <b>A Yes.</b></p> <p>19 Q Did the defendant's expert survey was that</p> <p>20 an Eveready format or a Squirt format?</p> <p>21 <b>A I believe that was Eveready.</b></p> <p>22 Q The next case Hain Blueprint versus</p> <p>23 Blueprint Coffee. Is that a trademark case?</p> <p>24 <b>A Yes.</b></p> <p>25 Q Did you conduct a survey in that case?</p>	<p>20</p> <p>1 answer.</p> <p>2 <b>A It was a survey to measure the primary</b></p> <p>3 <b>(indiscernible) of a mark.</b></p> <p>4 THE REPORTER: I'm sorry. I'm sorry.</p> <p>5 Could you start that over, please?</p> <p>6 <b>A It was a survey to measure the primary</b></p> <p>7 <b>significance of a mark.</b></p> <p>8 Q (By Mr. Getzoff) Did the other side</p> <p>9 conduct a likelihood of confusion survey?</p> <p>10 <b>A I don't know.</b></p> <p>11 Q You don't -- you don't remember or not</p> <p>12 that you know of?</p> <p>13 <b>A Not that I know of.</b></p> <p>14 Q The last case on your list of cases over</p> <p>15 the last four years, Titledown Brewing versus</p> <p>16 Green Bay Packers. This was also before the TTAB.</p> <p>17 You were retained by Titledown the petitioner,</p> <p>18 right?</p> <p>19 <b>A Yes.</b></p> <p>20 Q Did you perform a survey in that case?</p> <p>21 <b>A No.</b></p> <p>22 Q But did you critique a survey performed by</p> <p>23 the -- by Green Bay Packers?</p> <p>24 <b>A Yes.</b></p> <p>25 Q Is that a likelihood of confusion survey?</p>



Conducted on July 27, 2021

<p>21</p> <p>1 <b>A No.</b></p> <p>2 Q What kind of survey was it?</p> <p>3 <b>A Survey to measure secondary meaning.</b></p> <p>4 Q So, Dr. Anderson, if my notes are</p> <p>5 accurate, for all the cases listed by you the way</p> <p>6 you submitted a report or testified in the last</p> <p>7 four years, you did not conduct a likelihood of</p> <p>8 confusion survey for any of them. Is that right?</p> <p>9 MS. ALLEN: Objection, mischaracterizes</p> <p>10 the witness' testimony.</p> <p>11 <b>A Would you ask the question again?</b></p> <p>12 Q (By Mr. Getzoff) Yes. For all the cases</p> <p>13 listed on the last page of your expert report as</p> <p>14 cases you have provided an expert report in or</p> <p>15 testified over the last four years, you did not</p> <p>16 perform in likelihood of confusion survey for any</p> <p>17 of them. Is that right?</p> <p>18 MS. ALLEN: Same objection.</p> <p>19 <b>A None of these -- I didn't conduct a</b></p> <p>20 <b>likelihood of confusion survey for any of these</b></p> <p>21 <b>matters (indiscernible.) That's correct.</b></p> <p>22 THE REPORTER: I'm sorry. I lost part of</p> <p>23 that. Could you say that again?</p> <p>24 THE WITNESS: I did not conduct a</p> <p>25 likelihood of confusion survey for the matters</p>	<p>23</p> <p>1 this case, right?</p> <p>2 <b>A That's correct.</b></p> <p>3 Q You didn't conduct -- in this case you</p> <p>4 didn't conduct any kind of survey, correct?</p> <p>5 <b>A That's correct.</b></p> <p>6 Q Dr. Anderson, have you ever had an opinion</p> <p>7 that you submitted in an expert report that</p> <p>8 excluded either in whole or in part by a court?</p> <p>9 <b>A No.</b></p> <p>10 Q And you know what I mean by excluded,</p> <p>11 right?</p> <p>12 <b>A Why don't you tell me what you mean.</b></p> <p>13 Q Well, in the context of litigation, one</p> <p>14 side can file a motion to try to exclude the</p> <p>15 opinion of the other side's expert under what we</p> <p>16 call a Daubert. Are you familiar with that</p> <p>17 process?</p> <p>18 <b>A Somewhat.</b></p> <p>19 Q Have you ever had an opinion challenged by</p> <p>20 the other side in a litigation matter? And by</p> <p>21 challenge I mean where the other side filed a</p> <p>22 motion asking that your opinion be excluded either</p> <p>23 in whole or in part.</p> <p>24 <b>A I believe so.</b></p> <p>25 Q And it's your testimony that none of those</p>
<p>22</p> <p>1 listed on this list.</p> <p>2 THE REPORTER: Thank you.</p> <p>3 Q (By Mr. Getzoff) Dr. Anderson, when is</p> <p>4 the last time you did conduct a likelihood of</p> <p>5 confusion survey in a litigation context?</p> <p>6 <b>A I'm working on some presently. And it</b></p> <p>7 <b>seems like I -- I would struggle to find a time</b></p> <p>8 <b>when I'm not working on a likelihood of confusion</b></p> <p>9 <b>survey for a litigation context.</b></p> <p>10 Q Well, you haven't issued a written</p> <p>11 report -- between now and the last four years you</p> <p>12 have not issued a written report where you</p> <p>13 conducted a likelihood of confusion survey, right?</p> <p>14 <b>A That's correct.</b></p> <p>15 Q And so my question is, when is the last</p> <p>16 time you did issue a written report where you</p> <p>17 conducted a likelihood of confusion survey in a</p> <p>18 litigation context?</p> <p>19 <b>A I don't recall the time but it was more</b></p> <p>20 <b>than four years ago.</b></p> <p>21 THE REPORTER: I'm sorry, it was more than</p> <p>22 four years ago?</p> <p>23 THE WITNESS: That's correct.</p> <p>24 Q (By Mr. Getzoff) And to be clear, you did</p> <p>25 not conduct a likelihood of confusion survey in</p>	<p>24</p> <p>1 challenges have been successful.</p> <p>2 <b>A That's my understanding.</b></p> <p>3 Q Dr. Anderson, I want to pivot a little bit</p> <p>4 and talk about the report you submitted in this</p> <p>5 case, which we've marked as Exhibit 75. In the</p> <p>6 course of your work on this case did you ever talk</p> <p>7 to anybody at the plaintiff, Elevate Federal</p> <p>8 Credit Union?</p> <p>9 <b>A No.</b></p> <p>10 Q In the course of your work on this case,</p> <p>11 did you ever talk to anyone in the credit union or</p> <p>12 banking industry?</p> <p>13 <b>A Not about this matter.</b></p> <p>14 Q Right. You probably have a banking or</p> <p>15 credit union institution and you may talk to those</p> <p>16 folks for your personal business. But for</p> <p>17 purposes of this case, you never talked to anybody</p> <p>18 in the credit union or banking industry. Is that</p> <p>19 right?</p> <p>20 MS. ALLEN: Asked and answered.</p> <p>21 <b>A That's correct.</b></p> <p>22 Q (By Mr. Getzoff) For purposes of your</p> <p>23 work on this case you never talked to any</p> <p>24 customers or potential customers of credit union</p> <p>25 or banking services. Is that right?</p>



Conducted on July 27, 2021

<p>25</p> <p>1 MS. ALLEN: Objection, vague.</p> <p>2 <b>A I'm sorry, can you repeat the question?</b></p> <p>3 Q (By Mr. Getzoff) Yeah. For purposes of</p> <p>4 this case, you never personally talked to any</p> <p>5 customers or potential customers from credit union</p> <p>6 or banking services.</p> <p>7 MS. ALLEN: Same objection.</p> <p>8 <b>A Your question is, did I talk to anyone?</b></p> <p>9 Q (By Mr. Getzoff) Yeah. Did you talk to</p> <p>10 any customers or potential customers?</p> <p>11 <b>A No.</b></p> <p>12 Q Other than the attorneys for Fabian</p> <p>13 VanCott, the plaintiff's law firm, did you talk to</p> <p>14 anybody in the course of the work you performed in</p> <p>15 this case?</p> <p>16 <b>A With the exception of counsel, did I talk</b></p> <p>17 <b>to anyone about my work in this case?</b></p> <p>18 Q And let me -- I'm not talking to a</p> <p>19 significant other, hey, I'm working on this case.</p> <p>20 I mean for purposes of your report and your</p> <p>21 opinions, did you reach out and talk with anybody</p> <p>22 other than counsel?</p> <p>23 <b>A Not for purposes of my opinions. A</b></p> <p>24 <b>colleague proofread my report after I was done to</b></p> <p>25 <b>help check it for, you know, potential errors,</b></p>	<p>27</p> <p>1 MS. ALLEN: Objection, asked and answered.</p> <p>2 Mischaracterizes the witness' testimony.</p> <p>3 Q (By Mr. Getzoff) Is that right,</p> <p>4 Dr. Anderson?</p> <p>5 <b>A Could you repeat the question?</b></p> <p>6 Q There's been none in the last four years,</p> <p>7 correct?</p> <p>8 MS. ALLEN: Same objection.</p> <p>9 <b>A I think we -- you asked me that when we</b></p> <p>10 <b>went through my list on my CV.</b></p> <p>11 Q (By Mr. Getzoff) And you're not -- you</p> <p>12 can't remember the last time you did submit an</p> <p>13 expert report where you performed a likelihood of</p> <p>14 confusion survey, right?</p> <p>15 MS. ALLEN: Same objections.</p> <p>16 <b>A I don't remember the date.</b></p> <p>17 Q (By Mr. Getzoff) Well, if you can't</p> <p>18 remember a date, can you remember the case or</p> <p>19 anything about the last time you submitted an</p> <p>20 expert report that had a likelihood of confusion</p> <p>21 survey?</p> <p>22 MS. ALLEN: Asked and answered.</p> <p>23 <b>A Yes. As an example I submitted a report</b></p> <p>24 <b>survey (indiscernible.)</b></p> <p>25 THE REPORTER: I'm sorry, I didn't get all</p>
<p>26</p> <p>1 <b>that kind of thing, spelling, punctuation, but not</b></p> <p>2 <b>for my opinion, no.</b></p> <p>3 Q And that colleague is at MMR?</p> <p>4 <b>A Yes.</b></p> <p>5 Q Did that colleague also assist you with</p> <p>6 any of your analysis or performing any of the</p> <p>7 critiques or opinions that you provided in your</p> <p>8 expert report?</p> <p>9 <b>A No.</b></p> <p>10 Q How many -- I may have asked this question</p> <p>11 before, but it may have been a different one, so</p> <p>12 let me just ask it again. In a litigation context</p> <p>13 how many likelihood of confusion surveys have you</p> <p>14 performed?</p> <p>15 MS. ALLEN: Objection, asked and answered.</p> <p>16 Q (By Mr. Getzoff) And let me -- let me</p> <p>17 clarify that. That you performed and that you</p> <p>18 disclosed in any written expert report.</p> <p>19 MS. ALLEN: Same objection.</p> <p>20 <b>A A report where I was the signing</b></p> <p>21 <b>testifying expert?</b></p> <p>22 Q (By Mr. Getzoff) Correct.</p> <p>23 <b>A I don't recall the number.</b></p> <p>24 Q Well, there's been -- just so we're clear,</p> <p>25 there's been none in the last four years, right?</p>	<p>28</p> <p>1 that. I submitted a report that what?</p> <p>2 <b>A I submitted a report about a likelihood of</b></p> <p>3 <b>confusion survey that I conducted in a matter</b></p> <p>4 <b>involving Rimowa or Rimowa about luggage, the</b></p> <p>5 <b>suitcases. But that was more than four years ago.</b></p> <p>6 Q (By Mr. Getzoff) And you can't remember</p> <p>7 how many expert reports you had signed where you</p> <p>8 performed a likelihood of confusion survey.</p> <p>9 MS. ALLEN: Objection, asked and answered.</p> <p>10 <b>A Not offhand.</b></p> <p>11 Q (By Mr. Getzoff) Is it more than ten?</p> <p>12 MS. ALLEN: Asked and answered.</p> <p>13 <b>A I don't know the number. But I don't -- I</b></p> <p>14 <b>don't believe it's more than ten.</b></p> <p>15 Q (By Mr. Getzoff) Do you think it's more</p> <p>16 than five?</p> <p>17 <b>A I don't recall.</b></p> <p>18 Q Dr. Anderson, you are charging the</p> <p>19 plaintiff for the time you spent on this case,</p> <p>20 right?</p> <p>21 <b>A No.</b></p> <p>22 Q Who are you charging for the time you're</p> <p>23 spending on this case?</p> <p>24 <b>A I don't charge anyone for my time on this</b></p> <p>25 <b>case.</b></p>

Conducted on July 27, 2021

<p>29</p> <p>1 Q Are you being paid for the work you're</p> <p>2 performing on this case?</p> <p>3 A No.</p> <p>4 Q You're doing this case for free?</p> <p>5 A I don't charge for my work on this case.</p> <p>6 My employer charges for it.</p> <p>7 Q Okay. So your employer is charging the</p> <p>8 plaintiff for your work on this case, MMR, right?</p> <p>9 A MMR charges for my time, that's correct.</p> <p>10 Q Do you see those bills when they go out?</p> <p>11 A I don't think I've seen the bills in this</p> <p>12 case.</p> <p>13 Q How much -- as of today how much has -- or</p> <p>14 as of the last time a bill was sent out, how much</p> <p>15 has MMR charged the plaintiff for your work on</p> <p>16 this case total?</p> <p>17 A According to my report MMR billed \$20,000</p> <p>18 for the rebuttal report. And I don't know that</p> <p>19 any additional invoices have been sent.</p> <p>20 Q Looking at your report on page 3 it says</p> <p>21 materials reviewed and compensation. Do you see</p> <p>22 that?</p> <p>23 A Yes.</p> <p>24 Q Is the listing of materials you reviewed,</p> <p>25 it's paragraph 12 with a number of subparagraphs,</p>	<p>31</p> <p>1 report that you would have wanted to change or</p> <p>2 revise?</p> <p>3 A Only in response to some things that</p> <p>4 Mr. Poret clarified in his deposition.</p> <p>5 Q So you upon reading Mr. Poret's</p> <p>6 deposition, there are things that occurred to you</p> <p>7 that you'd want to say further on that. Is that</p> <p>8 fair? Is that what you mean?</p> <p>9 A Well, what I mean is, for example, I</p> <p>10 describe a forward likelihood of confusion survey</p> <p>11 and a reverse likelihood of confusion survey in my</p> <p>12 report and explain why Mr. Poret's report didn't</p> <p>13 fit either of those accepted methodologies.</p> <p>14 Mr. Poret in his deposition said he</p> <p>15 intended to measure reverse likelihood of</p> <p>16 confusion. If I had known that when I wrote my</p> <p>17 report, I probably wouldn't have addressed the</p> <p>18 forward example because I would have focused on</p> <p>19 the reverse that Mr. Poret said he conducted.</p> <p>20 Q In order for trademark confusion to be</p> <p>21 actionable under the trademark clause, do you</p> <p>22 believe it has to be either forward confusion or</p> <p>23 reverse confusion?</p> <p>24 MS. ALLEN: Objection, calls for a legal</p> <p>25 conclusion.</p>
<p>30</p> <p>1 is that complete?</p> <p>2 A I believe that was complete as of the date</p> <p>3 I signed my report.</p> <p>4 Q Have you reviewed additional documents or</p> <p>5 materials since the time of your report for</p> <p>6 purposes of this case?</p> <p>7 A Yes.</p> <p>8 Q What have you?</p> <p>9 A I reviewed a transcript of (indiscernible)</p> <p>10 deposition.</p> <p>11 THE REPORTER: I'm sorry, Mr. Port?</p> <p>12 THE WITNESS: A transcript of Mr. Poret's</p> <p>13 deposition in this matter.</p> <p>14 Q (By Mr. Getzoff) Anything else besides</p> <p>15 Mr. Poret's deposition transcript?</p> <p>16 A No.</p> <p>17 Q Did you review your report in preparation</p> <p>18 for today?</p> <p>19 A Yes.</p> <p>20 Q In reviewing your report in preparation</p> <p>21 for this deposition, did you come across anything</p> <p>22 that you realized or believed was inaccurate in</p> <p>23 any way?</p> <p>24 A No.</p> <p>25 Q Did you come across anything in your</p>	<p>32</p> <p>1 A I couldn't answer that other than to say</p> <p>2 those are the only kinds of confusion I've seen in</p> <p>3 courts accept or rely on the survey to measure.</p> <p>4 Q (By Mr. Getzoff) Are you aware of any</p> <p>5 scenarios where there could be trademark confusion</p> <p>6 that's neither forward or reverse?</p> <p>7 A I don't know the answer to that. I've</p> <p>8 seeing allegations of confusion when a keyword</p> <p>9 search context and seen surveys that intended to</p> <p>10 measure that but never a survey that a court would</p> <p>11 rely on.</p> <p>12 Q Well, if I go into a store and look at</p> <p>13 products on the shelf, say it's drinks or cookies</p> <p>14 or chips, something like that, and I see two</p> <p>15 products with very similar names and I think they</p> <p>16 come from the same company, so I'm confused. I</p> <p>17 actually have a mistaken belief that those two</p> <p>18 products come from the same company. Is that</p> <p>19 forward confusion or reverse confusion?</p> <p>20 MS. ALLEN: Objection, calls for a legal</p> <p>21 conclusion.</p> <p>22 A I can't -- couldn't (indiscernible) about</p> <p>23 that.</p> <p>24 THE REPORTER: I'm sorry, I couldn't what?</p> <p>25 THE WITNESS: I couldn't provide an</p>

Conducted on July 27, 2021

<p>33</p> <p>1 opinion about that.</p> <p>2 THE REPORTER: Thank you.</p> <p>3 Q (By Mr. Getzoff) Is that because you're</p> <p>4 not familiar enough with what forward confusion or</p> <p>5 reverse confusion is or because you're not</p> <p>6 familiar with other kinds of confusion? Why can't</p> <p>7 you answer that question?</p> <p>8 MS. ALLEN: Objection, compound.</p> <p>9 <b>A Well, that may be up to a court to</b></p> <p>10 <b>determine. And you haven't given me very much</b></p> <p>11 <b>information to go on in that example.</b></p> <p>12 Q (By Mr. Getzoff) What else would you want</p> <p>13 to know from my hypothetical to enable you to</p> <p>14 answer?</p> <p>15 MS. ALLEN: Same objections.</p> <p>16 <b>A Again, that's up to the court to</b></p> <p>17 <b>determine. But I in my -- in my work that I do as</b></p> <p>18 <b>a survey expert I'd want to know which mark is the</b></p> <p>19 senior (indiscernible) and which mark is the</p> <p>20 junior.</p> <p>21 THE REPORTER: I'm sorry, which mark is</p> <p>22 what?</p> <p>23 THE WITNESS: Which mark is the senior</p> <p>24 user and which mark is the junior user.</p> <p>25 Q (By Mr. Getzoff) So if -- if the</p>	<p>35</p> <p>1 Q But I'm asking you for your understanding.</p> <p>2 I'm not asking you for a legal conclusion. I'm</p> <p>3 asking you for based on your experience as a</p> <p>4 survey expert, a marking expert, the other experts</p> <p>5 that you describe in your report, do you think</p> <p>6 trademark confusion has to be one of two types,</p> <p>7 reverse or forward?</p> <p>8 MS. ALLEN: Objection, calls for a legal</p> <p>9 conclusion.</p> <p>10 <b>A What I would say is I haven't seen a court</b></p> <p>11 <b>rely on survey to measure confusion that wasn't</b></p> <p>12 <b>forward or reverse.</b></p> <p>13 Q (By Mr. Getzoff) And so other than what</p> <p>14 you've seen from cases you've read, you don't have</p> <p>15 an opinion one way or the other as to the answer</p> <p>16 to my question.</p> <p>17 MS. ALLEN: Mischaracterizes the witness'</p> <p>18 prior testimony and asked and answered.</p> <p>19 <b>A Again, it would depend on the court. It's</b></p> <p>20 <b>up to the court to determine that. And my opinion</b></p> <p>21 <b>is based on the totality of my experience with</b></p> <p>22 <b>regard to likelihood of confusion survey, not only</b></p> <p>23 <b>for the surveys that I've read about.</b></p> <p>24 MR. GETZOFF: Okay. Off the record.</p> <p>25 (Break taken from 10:51 a.m. to</p>
<p>34</p> <p>1 consumer, in this case it's me in my hypothetical,</p> <p>2 if I've never encountered either mark before and I</p> <p>3 didn't know who was junior or senior, is the</p> <p>4 confusion I just described forward confusion or</p> <p>5 reverse confusion?</p> <p>6 MS. ALLEN: Calls for a legal conclusion.</p> <p>7 <b>A Well, as I said, I think it's up to a</b></p> <p>8 <b>court to determine that. And you haven't really</b></p> <p>9 <b>given me the information that I would need if I</b></p> <p>10 <b>(indiscernible) to form an opinion.</b></p> <p>11 THE REPORTER: Excuse me, would this be a</p> <p>12 good place to take a quick break? Matt, could we</p> <p>13 check into getting the Doctor -- I'm having quite</p> <p>14 a few more problems.</p> <p>15 MR. GETZOFF: Let me -- yeah, let me ask</p> <p>16 just one follow-up question.</p> <p>17 THE REPORTER: You bet.</p> <p>18 MR. GETZOFF: Then we'll just take a</p> <p>19 normal break.</p> <p>20 Q (By Mr. Getzoff) Dr. Anderson, is it your</p> <p>21 understanding that trademark confusion has to be</p> <p>22 one of two types, either forward confusion or</p> <p>23 reverse confusion?</p> <p>24 <b>A I think that would be up to a court to</b></p> <p>25 <b>determine.</b></p>	<p>36</p> <p>1 11:07 a.m.)</p> <p>2 Q (By Mr. Getzoff) Dr. Anderson, I want to</p> <p>3 go back to that luggage case that you just</p> <p>4 provided the spelling on. Rimowa was one of the</p> <p>5 parties to that case?</p> <p>6 <b>A Yes, I believe it was Rimowa, the</b></p> <p>7 <b>Travelers Club luggage.</b></p> <p>8 Q And which party did you represent?</p> <p>9 <b>A (Indiscernible.)</b></p> <p>10 THE REPORTER: I'm sorry?</p> <p>11 THE WITNESS: Travelers Club.</p> <p>12 Q (By Mr. Getzoff) And, Dr. Anderson, in</p> <p>13 that case you did perform a likelihood of</p> <p>14 confusion survey that was presented in a written</p> <p>15 report signed by you, correct?</p> <p>16 MS. ALLEN: Objection, asked and answered.</p> <p>17 <b>A Can you say that again? Could you repeat</b></p> <p>18 <b>the question, please?</b></p> <p>19 Q (By Mr. Getzoff) In that case you did</p> <p>20 provide a -- you did conduct a likelihood of</p> <p>21 confusion survey that was presented in a written</p> <p>22 report signed by you, correct?</p> <p>23 MS. ALLEN: Same objection.</p> <p>24 <b>A Yes.</b></p> <p>25 Q (By Mr. Getzoff) And was Travelers, the</p>

Conducted on July 27, 2021

<p>1 party that you were aligned with, were they being 2 accused of infringement? 3 <b>A Yes.</b> 4 Q Did your survey find no likelihood of 5 confusion? 6 <b>A That was my conclusion, my opinion.</b> 7 Q Did you -- was the format of that survey 8 was it an Eveready format or a Squirt format that 9 you conducted? 10 <b>A That was an Eveready.</b> 11 Q Did the plaintiff in that case do their 12 own survey? 13 <b>A I don't believe so.</b> 14 Q Did that case go to trial? 15 <b>A No.</b> 16 Q What was the trademark at issue in that 17 case? 18 <b>A It was trade dress for certain visual</b> 19 <b>elements on luggage.</b> 20 Q Did you find -- as part of your opinion in 21 that case did you find that the trade dress 22 elements had sufficient consumer awareness to 23 justify an Eveready format? 24 MS. ALLEN: Objection, calls for a legal 25 conclusion and is outside of the scope of this</p>	<p>1 <b>consumer awareness as a senior user's mark to</b> 2 <b>justify the use of an Eveready survey.</b> 3 Q And in the Rimowa case because you used an 4 Eveready format for your survey doesn't that 5 necessarily mean you opined that the senior users 6 trademark, or trade dress in that case, had a 7 sufficient level of consumer awareness? 8 MS. ALLEN: Objection, mischaracterizes 9 the witness' testimony. 10 <b>A I don't know whether I opined on that.</b> 11 <b>Rimowa -- Rimowa argued that its trade dress</b> 12 <b>was -- the trade dress at issue was</b> 13 <b>(indiscernible.)</b> 14 THE REPORTER: The trade dress at issue 15 was what? 16 THE WITNESS: Was famous. 17 Q (By Mr. Getzoff) So in that case you did 18 not independently determine or opine that the 19 senior user's trade dress had that sufficient 20 level of consumer awareness. Is that correct? 21 <b>A What do you mean independent?</b> 22 Q Well, you just testified I think that you 23 relied on the plaintiff's own allegations to 24 satisfy that prerequisite for using an Eveready 25 format. And my question is, did you do anything</p>
<p>1 expert report. 2 <b>A What was your question?</b> 3 Q (By Mr. Getzoff) In the report you 4 submitted in the Rimowa versus Travelers case did 5 you give an opinion that the trade dress elements 6 at issue in that case had sufficient consumer 7 awareness to justify the use of an Eveready 8 format? 9 MS. ALLEN: Same objections. 10 <b>A I don't recall.</b> 11 Q (By Mr. Getzoff) Would you agree with me 12 that for an Eveready format survey to be 13 appropriate, that mark at issue has to have a 14 sufficient level of consumer awareness? 15 MS. ALLEN: Objection, just vague. 16 <b>A When you say -- what do you mean when you</b> 17 <b>say the mark at issue?</b> 18 Q (By Mr. Getzoff) The mark that's being 19 asserted in a case. 20 <b>A So are you referring to the senior user?</b> 21 Q Yes. I'm referring to -- yes, I'm 22 referring to the senior user. 23 <b>A My understanding of court standards for an</b> 24 <b>Eveready survey measuring forward likelihood of</b> 25 <b>confusion is that the -- there must be sufficient</b></p>	<p>1 independent of simply relying on what the 2 plaintiff said for satisfying yourself that the 3 senior user's trade dress had the requisite level 4 of consumer awareness? 5 MS. ALLEN: Objection, mischaracterizes 6 the witness' prior testimony. 7 <b>A I don't recall what other information I</b> 8 <b>may have relied on in that matter.</b> 9 Q (By Mr. Getzoff) How many years ago was 10 that case? How many years ago did you submit your 11 report in that case? 12 <b>A I think I testified earlier today I don't</b> 13 <b>recall but more than four years.</b> 14 Q Can you name for me another case where you 15 submitted an expert report where you conducted a 16 likelihood of confusion survey? 17 MS. ALLEN: Objection, asked and answered. 18 <b>A Not offhand, no.</b> 19 Q (By Mr. Getzoff) So the only case you can 20 identify where you conducted a likelihood of 21 confusion survey, sitting here today, is the 22 Rimowa versus Travelers Club case, right? 23 MS. ALLEN: Asked and answered. 24 <b>A No, that's not correct.</b> 25 Q (By Mr. Getzoff) So you can identify</p>

Conducted on July 27, 2021

<p>1 another case for me where you conducted a 2 likelihood of confusion survey -- 3 MS. ALLEN: Asked and answered. 4 Q (By Mr. Getzoff) -- in a written report? 5 <b>A Are you asking about surveys I conducted 6 or reports that I've provided?</b> 7 Q Reports you provided that included 8 likelihood of confusion survey that you conducted. 9 MS. ALLEN: Objection, vague. 10 <b>A I think I've answered that several times. 11 That's -- I have given you the example I can 12 remember, as I sit here today.</b> 13 Q (By Mr. Getzoff) And that's the Rimowa 14 case? 15 MS. ALLEN: Same objection. 16 <b>A That's the one that comes to mind right 17 now.</b> 18 Q (By Mr. Getzoff) Dr. Anderson, have you 19 ever conducted the likelihood of confusion survey 20 that was that presented in a written report where 21 you used a Squirt format? 22 MS. ALLEN: Asked and answered. 23 <b>A Can you ask that again?</b> 24 Q (By Mr. Getzoff) Have you ever performed 25 a survey that was disclosed in a written expert</p>	<p>41 43 1 also include all the bases and reasons for the 2 opinions that you will express in this case? 3 MS. ALLEN: Objection, vague and 4 ambiguous, calls for speculation. 5 <b>A It provides -- my report provides the 6 bases and explanations for arguments that I've 7 made in that report. And I don't know, as I said 8 before, what else may be asked.</b> 9 Q (By Mr. Getzoff) Well, and I'm not asking 10 you to predict what may be asked. I'm asking you 11 is your report complete in terms of including all 12 of the opinions that you plan to present as well 13 as the bases and reasonings for those opinions? 14 MS. ALLEN: Objection, vague, asked and 15 answered. 16 Q (By Mr. Getzoff) Dr. Anderson, are you 17 thinking about your answer? 18 <b>A I am. I believe all the explanation and 19 justification for my arguments are included in my 20 report.</b> 21 Q Dr. Anderson, the likelihood of confusion 22 survey that you did in the Rimowa case, was that 23 done over the Internet or was that done by 24 intercepting people in a mall? 25 MS. ALLEN: Objection, just outside the</p>
<p>42 1 report where you used a Squirt format? 2 MS. ALLEN: Same objection. 3 <b>A And you're asking about an expert report 4 that I signed as the testifying expert. Is that 5 correct?</b> 6 Q (By Mr. Getzoff) Correct. 7 <b>A I don't recall. Not in the past four 8 years.</b> 9 Q Right. And we already know that. I'm 10 asking ever in your career have you signed an 11 expert report that disclosed a likelihood of 12 confusion survey that used a Squirt format? 13 MS. ALLEN: Asked and answered, vague. 14 <b>A I don't recall today.</b> 15 Q (By Mr. Getzoff) Dr. Anderson, regarding 16 the report you submitted in this case, does your 17 report contain a complete statement of all the 18 opinions that you will express and the basis and 19 reasons for them? 20 MS. ALLEN: Objection, vague and compound. 21 <b>A I'm not sure how to answer. I don't know 22 what questions will be asked of me. But I don't 23 believe I have any other opinions about the Poret 24 report that aren't included in my report.</b> 25 Q (By Mr. Getzoff) And does your report</p>	<p>44 1 scope of this report, but. 2 <b>A It was both.</b> 3 Q (By Mr. Getzoff) Dr. Anderson, in this 4 case you could have done your own likelihood of 5 confusion survey, right? 6 MS. ALLEN: Objection, calls for 7 speculation. 8 <b>A I don't know that I could. Well, let me 9 say that differently. I don't know that I could 10 have done a reliable likelihood of confusion 11 survey. I'm not sure that the circumstances in 12 this dispute allow for a likelihood of confusion 13 survey that would be reliable to provide a measure 14 of likelihood of confusion in this matter.</b> 15 Q (By Mr. Getzoff) Is it your opinion 16 that -- well, in your report you don't -- I think 17 you expressly said you're not giving an opinion as 18 to whether an Eveready survey would be 19 appropriate. Is that right? 20 MS. ALLEN: Objection. The document 21 speaks for itself. 22 <b>A Can you --</b> 23 Q (By Mr. Getzoff) Yeah. I'm looking at 24 footnote 49 of your report. It's page 18. 25 <b>A I see it.</b></p>



Conducted on July 27, 2021

<p>45</p> <p>1 Q And you say, quote, I am not providing an 2 opinion regarding the level of awareness of either 3 mark, nor that an Eveready survey would 4 appropriate in this matter. 5 Do you stand by that statement? 6 <b>A Since this report, as I mentioned earlier, 7 I reviewed the transcript of Mr. Poret's 8 deposition. I believe that Mr. Poret has 9 indicated he does not believe that these marks are 10 well known. So to the extent that Mr. Poret is 11 commenting on awareness, I would reserve the right 12 to rely on his opinion in my matter. But 13 otherwise I still stand by my statement.</b> 14 Q So you don't -- you don't have an opinion. 15 You're not offering an opinion that an Eveready 16 format would have been appropriate in this case, 17 right? 18 MS. ALLEN: Objection, asked and answered, 19 mischaracterizes the testimony. 20 <b>A Based on Mr. Poret's opinion that the 21 awareness of these marks is low, it seems that an 22 Eveready survey would not be appropriate in this 23 matter.</b> 24 Q (By Mr. Getzoff) Other than seeing what 25 Mr. Poret said, did you do any independent</p>	<p>47</p> <p>1 <b>measure the likelihood of confusion in this kind 2 of context. I believe that's correct.</b> 3 Q (By Mr. Getzoff) Is it -- is it 4 possible -- I want to ask you some questions about 5 the requirements for consumer awareness of a mark 6 to justify an Eveready format. Is it possible for 7 a consumer to have had a recent exposure to a 8 mark, say seen an advertisement of a mark, but the 9 awareness of that mark still is not sufficiently 10 high to justify an Eveready survey format. 11 MS. ALLEN: Objection, incomplete 12 hypothetical. 13 <b>A I think a court would have to determine 14 what level of consumer awareness is required. And 15 I think the question you're asking is rather 16 vague. I couldn't answer based on what you have 17 provided.</b> 18 Q (By Mr. Getzoff) Well, let me ask it a 19 different way. I mean you would agree that 20 consumers can be exposed to dozens of marks every 21 day based on just walking around and being on the 22 Internet and seeing various types of 23 advertisements, right? 24 <b>A Yes, they can be.</b> 25 Q And you would agree that simply seeing an</p>
<p>46</p> <p>1 research or investigation yourself to determine 2 whether either of the marks, either the senior or 3 junior user's mark, had sufficient consumer 4 awareness to justify an Eveready test? 5 <b>A I described in my report several searches 6 that I conducted for these marks and the placement 7 of those marks within search results. That may 8 have some bearing on consumer awareness, but I 9 would say I did not conduct any research to 10 directly measure the awareness of either of 11 (indiscernible.)</b> 12 THE REPORTER: To measure the awareness of 13 what? 14 THE WITNESS: Of either of these marks. 15 THE REPORTER: Thank you. 16 Q (By Mr. Getzoff) Is it your testimony 17 that given the circumstances of this case that 18 there is no likelihood of confusion survey of any 19 format that could have been done reliably? 20 MS. ALLEN: Mischaracterizes the prior 21 testimony. 22 <b>A If we accept Mr. Poret's opinion that 23 these marks are not well known, then I believe 24 that's correct. Then I believe that there's no 25 survey format that the courts have relied on to</b></p>	<p>48</p> <p>1 advertisement from a company that advertises their 2 mark, that by itself doesn't -- doesn't create the 3 level of consumer awareness that would justify an 4 Eveready test, right? 5 MS. ALLEN: Objection, vague. 6 <b>A I think it could.</b> 7 Q (By Mr. Getzoff) So simply because -- 8 simply because a company advertises, which is to 9 say that they get their mark out, does that 10 automatically mean that there's a sufficient level 11 of consumer awareness to -- to justify an Eveready 12 format survey? 13 MS. ALLEN: Vague. 14 <b>A I think what's relevant in justifying an 15 Eveready survey is whether consumers are aware of, 16 you know, forward likelihood of confusion survey, 17 the senior mark, regardless of how they became 18 aware of it.</b> 19 Q (By Mr. Getzoff) And my question is, is 20 mere advertising by the senior user of its mark, 21 does that automatically create sufficient 22 awareness for an Eveready survey? 23 MS. ALLEN: Asked and answered. 24 <b>A Once again, the court would have to 25 determine if that is sufficient awareness. But</b></p>

Conducted on July 27, 2021

<p style="text-align: right;">49</p> <p><b>1 advertising can lead to consumer awareness for a</b>  <b>2 mark.</b>  3 Q (By Mr. Getzoff) Have you ever conducted  4 or been involved, whether you signed a report or  5 not, have you ever been involved in an Eveready  6 likelihood of confusion survey where you had to  7 first determine and satisfy yourself that the mark  8 had a sufficient level of consumer awareness?  <b>9 A I don't recall.</b>  10 Q Do you recall for any survey that you've  11 ever been involved in applying any sort of  12 criteria or metric for determining whether the  13 mark had sufficient consumer awareness to justify  14 an Eveready survey?  15 MS. ALLEN: Asked and answered.  <b>16 A Yes.</b>  17 (Simultaneous crosstalk.)  <b>18 A I may have misunderstood the previous</b>  <b>19 question.</b>  20 THE REPORTER: I'm sorry, you guys over  21 spoke. I didn't get all that, Doctor.  22 THE WITNESS: I said I may have  23 misunderstood the previous question.  24 Q (By Mr. Getzoff) So let's make sure the  25 record is clear. So, yes, you do recall using a</p>	<p style="text-align: right;">51</p> <p><b>1 and the metric may be dependent on the context</b>  <b>2 that's under dispute.</b>  3 Q And my question is, can you identify --  4 other than relying on the survey of consumer  5 awareness, can you describe or identify any metric  6 or criteria that you've ever relied upon for doing  7 an Eveready survey?  8 MS. ALLEN: Asked and answered.  <b>9 A I think measures of sales volume or sales</b>  <b>10 revenue or distribution through a retail channel</b>  <b>11 or distribution channel, those are some examples</b>  <b>12 of things that I would have evaluated and I have</b>  <b>13 evaluated in other matters.</b>  14 Q (By Mr. Getzoff) Anything else?  <b>15 A I'm sure there are. They just aren't</b>  <b>16 coming to mind right now.</b>  17 Q Dr. Anderson, you're familiar with an  18 article written by -- in 2019 written by Swann and  19 Henn called Likelihood of Confusion Surveys: The  20 Ever-Constant Eveready Format, The Ever-Evolving  21 Squirt Format.  <b>22 A I believe so. I can't be sure of the</b>  <b>23 title but I believe so.</b>  24 Q You cite that article multiple times  25 throughout your report, don't you?</p>
<p style="text-align: right;">50</p> <p>1 criteria or metric to determine whether a mark had  2 sufficient consumer awareness to justify an  3 Eveready test. Is that right?  <b>4 A Yes.</b>  5 Q In that situation what was the criteria or  6 metric that you applied?  <b>7 A I think there would be more than one</b>  <b>8 situation and more than one type of metric.</b>  9 Q Can you identify any criteria or metric  10 that you've ever applied in that circumstance?  11 MS. ALLEN: Vague.  <b>12 A Yes. For example, a survey measure of</b>  <b>13 consumer awareness for the mark.</b>  14 Q (By Mr. Getzoff) So you're talking about  15 a situation where you actually performed a survey  16 itself on consumer awareness prior to performing a  17 survey on the likelihood of confusion in the  18 Eveready format. Is that right?  <b>19 A I don't recall whether I conducted that or</b>  <b>20 in a survey.</b>  21 Q Can you -- other than relying on a survey  22 of consumer awareness, can you recall any other  23 criteria or metric that you relied upon for  24 consumer awareness to justify an Eveready survey?  <b>25 A Again, there have been different metrics,</b></p>	<p style="text-align: right;">52</p> <p><b>1 A You said likelihood of confusion survey is</b>  <b>2 the ever-constant Eveready format, the</b>  <b>3 ever-evolving Squirt format?</b>  4 Q Correct.  <b>5 A Is that what you said?</b>  6 Q Correct. Published in The Trademark  7 Reporter.  <b>8 A I did cite that multiple times in my</b>  <b>9 report.</b>  10 (Exhibit No. 76 was marked for  11 identification and is attached to the transcript.)  12 Q I have just sent -- distributed that  13 article, which we'll mark as Exhibit 76 to this  14 deposition. It's in the chat. Do you have it,  15 Dr. Anderson?  <b>16 A Would you like me to download it?</b>  17 Q Yes. I'm going to be referring to it.  <b>18 A I have the exhibit.</b>  19 Q Do you recognize this article as being an  20 authority on general guidelines for how to conduct  21 appropriate surveys?  <b>22 A I don't think I agree with the actual</b>  <b>23 question that you asked. But I -- it's a rather</b>  <b>24 vague. I wouldn't say this is an authority about</b>  <b>25 how to conduct surveys in general.</b></p>



Conducted on July 27, 2021

<p>53</p> <p>1 Q Do you recognize this article, this paper, 2 as authoritative as to the topic that -- the 3 topics it addresses? 4 MS. ALLEN: Vague. 5 <b>A I would recognize this article as</b> 6 <b>authoritative regarding likelihood of confusion</b> 7 <b>surveys and the issues that it addresses regarding</b> 8 <b>those kind of surveys.</b> 9 Q (By Mr. Getzoff) I mean it makes sense. 10 You cited it a bunch of times in your own report, 11 correct? 12 <b>A That's right. I think the phrasing of the</b> 13 <b>question just gave me pause.</b> 14 Q This article, I'll call it the Swann 15 article, this article recognizes the usefulness of 16 using Internet search results to conduct a Squirt 17 survey, right? 18 MS. ALLEN: Vague. 19 <b>A I don't know that it says that exactly.</b> 20 Q (By Mr. Getzoff) Well, if you look at the 21 article starting on page 679 there's a heading 22 that reads, quote, measuring likelihood of 23 confusion on the Internet. Do you see that? 24 <b>A I see that.</b> 25 Q And it talks about measuring likelihood of</p>	<p>55</p> <p>1 to the conclusion 683. Does it ever refer to 2 Internet -- these types of Squirt Internet surveys 3 as one-room or two-room? 4 <b>A I don't see it in that section, no.</b> 5 Q Now he does talk about it in the prior 6 section in the context of Eveready tests, right? 7 <b>A I see it in the section discussing Squirt</b> 8 <b>surveys.</b> 9 Q That's prior to the discussion on 10 measuring likelihood of confusion on the Internet, 11 right? 12 <b>A Well, it's in Section III that's titled</b> 13 <b>The Ever-Evolving Squirt Format. I don't know in</b> 14 <b>that excludes Internet surveys.</b> 15 Q Well, I directed your attention to 16 Section IV, measuring likelihood of confusion on 17 the Internet. And I think you agreed with me that 18 the authors do not use one-room or two-room in 19 discussing Squirt formats based on Internet 20 searches, right? 21 MS. ALLEN: Mischaracterizes prior 22 testimony. 23 <b>A Well, the authors discuss the two-room</b> 24 <b>format. They discuss Squirt surveys. And then</b> 25 <b>they get into specific information regarding</b></p>
<p>54</p> <p>1 confusion among products or services sold or 2 offered on the Internet, right? 3 <b>A Sorry, would you repeat the question?</b> 4 Q It talks about measuring -- the likelihood 5 of using a survey to measure likelihood of 6 confusion of goods or services offered over the 7 Internet. 8 <b>A I think that's fair, yes.</b> 9 Q And it talks about the requirement for 10 there to be proximity between the marks or the 11 companies in search results in order to justify a 12 Squirt methodology, right? 13 <b>A Well, it talks about the standards for</b> 14 <b>conducting a survey that measures likelihood of</b> 15 <b>confusion in an Internet context and it talks</b> 16 <b>about proximity. But I think it discusses more</b> 17 <b>than what you just said.</b> 18 Q Of course, it's a much longer article than 19 my one sentence. But proximity is one of the 20 things it discusses for Internet-based shoppers, 21 right? 22 <b>A Yes.</b> 23 Q In this section -- so this section on 24 likelihood of confusion among Internet shoppers 25 starts on page 679, and it continues until we get</p>	<p>56</p> <p>1 <b>Internet surveys. I don't know that they're not</b> 2 <b>related, but I don't see the phrase one-room or</b> 3 <b>the phrase two-room in that section that you're</b> 4 <b>referring to.</b> 5 Q (By Mr. Getzoff) Looking at the 6 methodology described in Section IV discussed by 7 the authors based on Internet search result, would 8 you characterize the Squirt format described by 9 them as being a one-room or two-room Squirt? 10 MS. ALLEN: Objection, vague. 11 <b>A Can you direct me where you're looking or</b> 12 <b>where you're at?</b> 13 Q (By Mr. Getzoff) Sure. I guess first I 14 should ask, are you familiar with this section of 15 the article? It's only four pages long, 16 Section IV, measuring likelihood of confusion on 17 the Internet. 18 <b>A Yes, I'm familiar with it.</b> 19 Q And you're familiar with the methodology 20 described, which is summarized on page 682, where 21 they describe several different scenarios for 22 justifying a Squirt format based on Internet 23 searches? 24 <b>A Yes.</b> 25 Q And the authors introduced these four</p>

Conducted on July 27, 2021

<p>57</p> <p>1 scenarios saying, while this article does not 2 purport to outline all possible scenarios for 3 sufficient competitive proximity on the Internet, 4 we believe a Squirt format is most likely 5 appropriate in online situations in which it is 6 typical under normal marketplace conditions for -- 7 and then they describe four different scenarios, 8 right, A through D? 9 <b>A I see that.</b> 10 Q Would you describe or would you yourself 11 characterize the surveys that they describe in 12 these scenarios as being a one-room type or 13 two-room type? 14 <b>A I don't think these scenarios describe a</b> 15 <b>Squirt survey. These scenarios describe the</b> 16 <b>conditions under which a Squirt survey may be</b> 17 <b>deemed appropriate based on an analysis of</b> 18 <b>proximity.</b> 19 Q Do you believe -- looking at this entire 20 section, Section IV that begins on page 679, that 21 the discussion by the authors of the Squirt format 22 are they describing a one-room Squirt format or a 23 two-room Squirt format? If you know. 24 <b>A The way I understand this section I don't</b> 25 <b>think it describes the format of a Squirt survey.</b></p>	<p>59</p> <p>1 provided an expert opinion on the topic of how 2 people use Internet search engines? 3 MS. ALLEN: Same objection. 4 <b>A I don't recall.</b> 5 Q (By Mr. Getzoff) Do you consider your 6 self an expert on that topic? 7 MS. ALLEN: Objection, vague. 8 <b>A To the extent that it -- to the extent</b> 9 <b>that it related to the consumer behavior and</b> 10 <b>consumer psychology, yes.</b> 11 Q (By Mr. Getzoff) Do you consider yourself 12 an expert as to why a consumer might use one 13 search engine over another? 14 MS. ALLEN: Objection, vague. 15 <b>A Again, it depends on the question being</b> 16 <b>asked or the issue being -- being discussed. If</b> 17 <b>it has to do with consumer behavior and</b> 18 <b>decision-making, consumer psychology, then I may</b> 19 <b>be able to provide an expert opinion about that.</b> 20 Q (By Mr. Getzoff) Have you ever given an 21 expert opinion in any context on the topic of why 22 a person might use one Internet search engine over 23 another? 24 MS. ALLEN: Vague. 25 <b>A I don't recall.</b></p>
<p>58</p> <p>1 <b>It describes when a Squirt survey would be</b> 2 <b>appropriate, really discussing whether how to</b> 3 <b>determine whether there is sufficient proximity to</b> 4 <b>justify a Squirt survey.</b> 5 Q Dr. Anderson, do you consider yourself an 6 expert on Internet search engines? 7 <b>A I wouldn't characterize it that way, no,</b> 8 <b>not in the abstract.</b> 9 Q Do you consider yourself an expert on how 10 search engines work? 11 <b>A No.</b> 12 Q Do you consider -- do you consider 13 yourself on an expert on the differences between 14 particular search engines? 15 MS. ALLEN: Objection, vague. 16 <b>A Well, some differences speak for</b> 17 <b>themselves. But as an expert, no, I wouldn't say</b> 18 <b>that I would provide an expert opinion about how</b> 19 <b>search engines work or the differences between.</b> 20 Q (By Mr. Getzoff) Have you ever -- have 21 you ever provided an expert opinion as to how 22 people or consumers use Internet search engines? 23 MS. ALLEN: Objection, vague. 24 <b>A Would you restate your question?</b> 25 Q (By Mr. Getzoff) Yeah. Have you ever</p>	<p>60</p> <p>1 Q (By Mr. Getzoff) In your report I'm 2 looking at paragraph 35. It's on page 14. 3 <b>A Paragraph 35?</b> 4 Q Correct. 5 <b>A I see it.</b> 6 Q You make an assertion regarding the 7 percentage of people that use the Bing search 8 engine versus the Google search engine? 9 <b>A I don't know that I make that assertion.</b> 10 <b>I cite a source that provides that, yes.</b> 11 Q Yeah, fair response. Did you consider 12 yourself an expert as to market share of the 13 available search engines? 14 MS. ALLEN: Vague. 15 <b>A I'm not even sure what you mean by that</b> 16 <b>question.</b> 17 Q (By Mr. Getzoff) Do you consider yourself 18 an expert on market share of the competing search 19 engines that are available? 20 MS. ALLEN: Vague. 21 <b>A That -- if not identical, it's very</b> 22 <b>similar to the question that I just said I really</b> 23 <b>didn't understand. But I -- I do consider myself</b> 24 <b>to be an expert on marketing. And market share is</b> 25 <b>a marketing-related topic. So I'm not -- I'm not</b></p>

Conducted on July 27, 2021

<p>61</p> <p>1 <b>sure how to answer your question.</b></p> <p>2 Q (By Mr. Getzoff) Well, you know what</p> <p>3 market share means, right?</p> <p>4 <b>A Yes.</b></p> <p>5 Q And you know what Internet search engines</p> <p>6 are, right?</p> <p>7 <b>A Yes.</b></p> <p>8 Q And fair to conclude that different</p> <p>9 competing Internet search engines have different</p> <p>10 market share based on Internet users, right?</p> <p>11 <b>A Well, that's according to the source that</b></p> <p>12 <b>I cited here, that's the case.</b></p> <p>13 Q Are you an expert on that topic?</p> <p>14 <b>A On the topic of market share?</b></p> <p>15 Q On the topic of market share for Internet</p> <p>16 search engines. I'm not -- I'm not asking about</p> <p>17 marketing generally. I'm not asking about market</p> <p>18 share as part of marketing generally. I'm asking</p> <p>19 about the specific topic that you address in</p> <p>20 paragraph 35 of your report about the market share</p> <p>21 of Internet search engines, of different Internet</p> <p>22 search engines.</p> <p>23 MS. ALLEN: Asked and answered.</p> <p>24 <b>A Yeah. I really don't understand your</b></p> <p>25 <b>question.</b></p>	<p>63</p> <p>1 Q Did you find that using an Internet</p> <p>2 search?</p> <p>3 <b>A Well, I found it on the Internet.</b></p> <p>4 Q Is that -- is that the --</p> <p>5 <b>A It's somewhat vague.</b></p> <p>6 Q I'm sorry. I cut you off. Can you</p> <p>7 repeat?</p> <p>8 <b>A I said that the term Internet search is</b></p> <p>9 <b>somewhat vague, so I'm not sure exactly what you</b></p> <p>10 <b>mean.</b></p> <p>11 Q Well, how did you find -- how did you find</p> <p>12 this source on the Internet?</p> <p>13 <b>A I don't recall exactly how I found it.</b></p> <p>14 Q Well, isn't it fair to conclude that you</p> <p>15 found it using an Internet search? I mean how</p> <p>16 else would you have found this except searching on</p> <p>17 the Internet using a search engine?</p> <p>18 MS. ALLEN: Compound.</p> <p>19 <b>A Well, there are ways to search the</b></p> <p>20 <b>Internet without using a search engine. And I</b></p> <p>21 <b>address that in one of my criticisms to</b></p> <p>22 <b>Mr. Poret's report. And that's why I'm confused</b></p> <p>23 <b>by your question. But now you're qualifying the</b></p> <p>24 <b>question to ask did I use an Internet search</b></p> <p>25 <b>engine to find this. I don't recall.</b></p>
<p>62</p> <p>1 Q (By Mr. Getzoff) Other than --</p> <p>2 <b>A I consider myself about market share.</b></p> <p>3 Q -- other than citing an article that</p> <p>4 you've cited on footnote 40, do you have any</p> <p>5 independent knowledge or expertise on market share</p> <p>6 of Bing versus Google search engine?</p> <p>7 <b>A Yes.</b></p> <p>8 Q Do you cite that or rely upon that in your</p> <p>9 report?</p> <p>10 <b>A Well, I cited this example. And I've done</b></p> <p>11 <b>other research regarding the market share search</b></p> <p>12 <b>engines in the past and found similar results.</b></p> <p>13 Q In your report do you cite or rely upon</p> <p>14 any basis for the assertion you make in your</p> <p>15 paragraph 35 other than the citation and</p> <p>16 footnote 40?</p> <p>17 <b>A Well, I stated in paragraph 13 that I rely</b></p> <p>18 <b>on my knowledge in fields such as surveys,</b></p> <p>19 <b>consumer behavior, and marketing. But in terms of</b></p> <p>20 <b>the specific numbers I provided that one source in</b></p> <p>21 <b>the footnote -- footnote 40.</b></p> <p>22 Q Did you find -- the source that you cited</p> <p>23 footnote 40, did you find that source yourself or</p> <p>24 did someone provide that to you?</p> <p>25 <b>A I found that myself.</b></p>	<p>64</p> <p>1 Q (By Mr. Getzoff) Was this a document that</p> <p>2 you already were aware of or did you find it for</p> <p>3 purposes of your work on this case?</p> <p>4 <b>A It was for this case.</b></p> <p>5 Q How did you determine the reliability of</p> <p>6 the source that you cited in footnote 40?</p> <p>7 <b>A I don't recall what information I looked</b></p> <p>8 <b>at at that point.</b></p> <p>9 Q Did you do anything to confirm or vet the</p> <p>10 numbers or data that you saw in the source that</p> <p>11 you cited in footnote 40?</p> <p>12 MS. ALLEN: Vague.</p> <p>13 <b>A I don't know because it would be my</b></p> <p>14 <b>standard practice to do that. But I don't recall</b></p> <p>15 <b>what steps I took when I retrieved this on May 9th</b></p> <p>16 <b>of this year.</b></p> <p>17 Q (By Mr. Getzoff) And you didn't -- and</p> <p>18 your report doesn't cite or describe any sort of</p> <p>19 checking or vetting or other sources that you</p> <p>20 relied upon for what you said in paragraph 35,</p> <p>21 right?</p> <p>22 <b>A I don't believe it does.</b></p> <p>23 Q Have you ever done a survey of how</p> <p>24 consumers use search engines?</p> <p>25 MS. ALLEN: Vague.</p>

Conducted on July 27, 2021

<p>65</p> <p>1 <b>A Yes.</b></p> <p>2 Q (By Mr. Getzoff) What was that survey?</p> <p>3 What did that survey study?</p> <p>4 <b>A I would say it's more than one survey, not</b></p> <p>5 <b>just one. And I think those -- I think the</b></p> <p>6 <b>findings of that would be confidential. I don't</b></p> <p>7 <b>think I could share that.</b></p> <p>8 Q Well, what was the topic?</p> <p>9 <b>A And I'm not relying on that -- and I'm not</b></p> <p>10 <b>relying on that for my opinions in this matter.</b></p> <p>11 Q Okay. Okay. For your work on this case</p> <p>12 did you conduct any research to see or understand</p> <p>13 how consumers use search engines in the context of</p> <p>14 looking for credit union or banking services?</p> <p>15 <b>A I'm sorry in the context of what?</b></p> <p>16 Q In the context of shopping for a credit</p> <p>17 union or banking services.</p> <p>18 MS. ALLEN: Vague.</p> <p>19 <b>A Can you clarify what you mean?</b></p> <p>20 Q (By Mr. Getzoff) What part of that don't</p> <p>21 you understand?</p> <p>22 <b>A Well, maybe if you please repeat the</b></p> <p>23 <b>question and maybe I can figure it out.</b></p> <p>24 Q Yeah. For purposes of this case, did you</p> <p>25 conduct any research or any investigation to see</p>	<p>67</p> <p>1 <b>low-involvement situation. And that may affect</b></p> <p>2 <b>how they would use an Internet -- well, use an</b></p> <p>3 <b>Internet search engine. I think was what the</b></p> <p>4 <b>focus of the question.</b></p> <p>5 Q Other than your discussion in this section</p> <p>6 of your report regarding high-involvement and</p> <p>7 low-involvement purchasing decisions, did you</p> <p>8 conduct any other research or investigation on the</p> <p>9 topic of how people use search engines to shop for</p> <p>10 credit union or banking services?</p> <p>11 <b>A I think the only other example would be in</b></p> <p>12 <b>paragraph 35 that you have referred to about the</b></p> <p>13 <b>use of Internet search engines.</b></p> <p>14 Q Okay. Let me ask you about the</p> <p>15 high-involvement and low-involvement issue since</p> <p>16 you jumped to that.</p> <p>17 Have you conducted any surveys that you</p> <p>18 relied upon for this case to conclude whether</p> <p>19 shopping for credit union or banking services on</p> <p>20 the Internet is a high-involvement or</p> <p>21 low-involvement exercise?</p> <p>22 <b>A No. I believe I testified earlier today</b></p> <p>23 <b>that I have not conducted any surveys specifically</b></p> <p>24 <b>for this matter.</b></p> <p>25 Q Did you conduct any research into whether</p>
<p>66</p> <p>1 how consumers use search engines, an Internet</p> <p>2 search engine, when shopping for credit union or</p> <p>3 banking services?</p> <p>4 MS. ALLEN: Same objection.</p> <p>5 <b>A I would say to the extent that that is</b></p> <p>6 <b>related to -- well, I would say that that is</b></p> <p>7 <b>related to the research I conducted on</b></p> <p>8 <b>involvement. And that has an impact on what</b></p> <p>9 <b>information consumers may search for in a</b></p> <p>10 <b>particular context.</b></p> <p>11 Q (By Mr. Getzoff) What are you referring</p> <p>12 to?</p> <p>13 <b>A It's in my -- let me see if I can find it</b></p> <p>14 <b>here. On page 23 of my report, page 23,</b></p> <p>15 <b>paragraph 69, I discuss a concept called</b></p> <p>16 <b>involvement. And this continues into the next</b></p> <p>17 <b>page. And involvement as it's described here is a</b></p> <p>18 <b>degree of thought that consumers put into a</b></p> <p>19 <b>decision.</b></p> <p>20 <b>And I describe high-involvement and</b></p> <p>21 <b>low-involvement decisions. And when a consumer is</b></p> <p>22 <b>engaged in a high-involvement decision, they may</b></p> <p>23 <b>search for a lot of information or they search for</b></p> <p>24 <b>more information when they're in a</b></p> <p>25 <b>high-involvement situation than when they're in a</b></p>	<p>68</p> <p>1 shopping on the Internet for banking or credit</p> <p>2 union services is a high-involvement or</p> <p>3 low-involvement decision?</p> <p>4 <b>A Yes.</b></p> <p>5 Q I see you cited two cases. Is that what</p> <p>6 you're referring to, exhibits -- or footnote 63</p> <p>7 and 64?</p> <p>8 <b>A I'm referring to that as well as research</b></p> <p>9 <b>on involvement, and I cited a consumer behavior</b></p> <p>10 <b>reference in footnote 62.</b></p> <p>11 Q Did that -- does that source in</p> <p>12 footnote 62 address credit union or banking</p> <p>13 services?</p> <p>14 <b>A I don't recall if it -- I don't recall if</b></p> <p>15 <b>it specifically addresses credit unions. But it</b></p> <p>16 <b>discusses context in which consumers are more</b></p> <p>17 <b>likely to be -- have a higher degree of</b></p> <p>18 <b>involvement versus a lower degree of involvement.</b></p> <p>19 <b>And financial institutions, financial decisions</b></p> <p>20 <b>are often an example of a situation in which</b></p> <p>21 <b>consumers would have a higher -- tend would have a</b></p> <p>22 <b>higher degree of involvement than a lower degree</b></p> <p>23 <b>of involvement.</b></p> <p>24 Q Did you look at any studies or surveys</p> <p>25 conducted by others regarding consumers' habits or</p>

Conducted on July 27, 2021

<p>69</p> <p>1 practices when selecting a financial institution?</p> <p>2 MS. ALLEN: Asked and answered.</p> <p>3 <b>A I would say that I relied on the sources</b></p> <p>4 <b>that I've cited in my report.</b></p> <p>5 Q (By Mr. Getzoff) In your report you say</p> <p>6 that a consumer in selecting a credit union is</p> <p>7 likely to gather detailed information about it,</p> <p>8 including speaking in person by telephone -- or by</p> <p>9 telephone with staff at the credit union. Did you</p> <p>10 rely on any --</p> <p>11 <b>A I'm sorry, before you go to your question,</b></p> <p>12 <b>can you point me to the paragraph?</b></p> <p>13 Q Yeah. Yeah. It's paragraph 72, sorry.</p> <p>14 <b>A Okay. I see it. What was the section you</b></p> <p>15 <b>were quoting?</b></p> <p>16 Q So in paragraph -- let me start over.</p> <p>17 In paragraph 72 you say that deciding</p> <p>18 which credit union to use is likely to be a</p> <p>19 high-involvement decision for many customers --</p> <p>20 consumers. And then you go on to assert that</p> <p>21 those consumers are likely to gather detailed</p> <p>22 information including speaking in person or by</p> <p>23 telephone with staff at the credit union. Do you</p> <p>24 see that?</p> <p>25 <b>A I see that.</b></p>	<p>71</p> <p>1 Q So if I read the source in footnote 62 it</p> <p>2 would say that when people select a credit union</p> <p>3 they're likely to speak in person or by telephone</p> <p>4 with staff at the credit union?</p> <p>5 MS. ALLEN: Objection, mischaracterizes --</p> <p>6 <b>A I don't think --</b></p> <p>7 MS. ALLEN: Yeah. Mischaracterizes his</p> <p>8 prior testimony.</p> <p>9 <b>A I don't think it would go into that</b></p> <p>10 <b>detail. That source would describe that when</b></p> <p>11 <b>consumers are in a high-involvement scenario they</b></p> <p>12 <b>are likely to attend to and seek out and process</b></p> <p>13 <b>more information than when they are in a</b></p> <p>14 <b>low-involvement scenario.</b></p> <p>15 Q (By Mr. Getzoff) Do you know how many</p> <p>16 customers of either of the parties in this case</p> <p>17 joined or signed up for that party's credit union</p> <p>18 services without talking to a representative?</p> <p>19 <b>A No.</b></p> <p>20 Q Do you agree that it's not necessary to</p> <p>21 sign up for a bank or credit union by talking to a</p> <p>22 representative either in person or on the phone,</p> <p>23 right?</p> <p>24 MS. ALLEN: Vague.</p> <p>25 <b>A I don't know. The answer may be different</b></p>
<p>70</p> <p>1 Q Did you rely on any source for that</p> <p>2 assertion?</p> <p>3 <b>A That's based on my expertise regarding</b></p> <p>4 <b>consumer psychology and how involvement affects</b></p> <p>5 <b>decision-making or evaluations.</b></p> <p>6 Q Other than your general expertise? I mean</p> <p>7 you don't cite anything for that search engines in</p> <p>8 your report, right?</p> <p>9 <b>A Well, I do cite the -- what involvements</b></p> <p>10 <b>and what impacts it can have on decision-making.</b></p> <p>11 Q Sir, paragraph 72 --</p> <p>12 (Simultaneous crosstalk.)</p> <p>13 Q (By Mr. Getzoff) -- paragraph 72 doesn't</p> <p>14 have any citations to it, right?</p> <p>15 <b>A Well, it follows from a discussion of</b></p> <p>16 <b>involvement that begins in paragraph 69 where</b></p> <p>17 <b>there is a citation.</b></p> <p>18 Q Are you saying that the source -- you're</p> <p>19 referring to footnote 62?</p> <p>20 <b>A Yes.</b></p> <p>21 Q Are you saying that the source cited in</p> <p>22 footnote 62 discusses the assertions and supports</p> <p>23 the assertions you made in paragraph 72?</p> <p>24 <b>A I think it does provide support for that,</b></p> <p>25 <b>yes.</b></p>	<p>72</p> <p>1 <b>for a bank or a credit union.</b></p> <p>2 Q (By Mr. Getzoff) That same paragraph --</p> <p>3 we're still on paragraph 72 -- you also mention</p> <p>4 that consumers are likely to discuss the decision</p> <p>5 with others, including family -- family and</p> <p>6 friends, before deciding whether to use that</p> <p>7 credit union.</p> <p>8 Do you have any data or support for that</p> <p>9 assertion?</p> <p>10 <b>A There is support in the Poret survey where</b></p> <p>11 <b>it seems more than half, 53.7 percent of</b></p> <p>12 <b>respondents indicated that they shared the</b></p> <p>13 <b>decision with others.</b></p> <p>14 Q Is that what you relied upon for your</p> <p>15 assertion in paragraph 72?</p> <p>16 <b>A Which assertion? I see the assertion</b></p> <p>17 <b>about consumers discussing information the others,</b></p> <p>18 <b>including family and friends?</b></p> <p>19 Q Correct.</p> <p>20 <b>A No. That's based on my expertise</b></p> <p>21 <b>regarding the affect an involvement can have on</b></p> <p>22 <b>consumer decision-making.</b></p> <p>23 Q Do you have any data or survey information</p> <p>24 or other information that you relied upon</p> <p>25 discussing what types of information consumers</p>



Conducted on July 27, 2021

<p>73</p> <p>1 consider before signing up for a financial 2 institution or credit union? 3 <b>A I'm sorry, can you repeat that?</b> 4 Q Yeah. Do you have any -- on the question 5 of the information that a person would consider 6 before joining a credit union or signing up for a 7 financial institution, do you have any data like 8 from a survey or something else that you relied 9 upon to know what information consumers rely upon 10 when making that decision? 11 MS. ALLEN: Vague. 12 <b>A There is a wealth of data about the effect 13 of involvement of consumer decision-making. So 14 I -- I would point you to the reference that I 15 cited. And from there are citations within that 16 document to other research that's been conducted 17 on that topic.</b> 18 Q (By Mr. Getzoff) Sir, my question 19 isn't -- isn't high-involvement versus 20 low-involvement. My question is with regards to 21 the people specifically signing up for credit 22 unions or banking financial institutions. 23 Do you have any source or data or survey 24 or other information you relied upon to know what 25 information people consider before making that</p>	<p>75</p> <p>1 MS. ALLEN: Vague. 2 <b>A I don't recall.</b> 3 Q (By Mr. Getzoff) Have you been involved 4 in any surveys in a nonlitigation context where 5 you studied consumer behavior in signing up for 6 credit union or banking services? 7 MS. ALLEN: Vague. 8 <b>A Yes.</b> 9 Q (By Mr. Getzoff) Did you rely on that 10 expertise for purposes of this case? 11 MS. ALLEN: Vague. 12 <b>A Not specifically. Only to the extent that 13 it informs my knowledge of the industry.</b> 14 Q (By Mr. Getzoff) So what were those 15 surveys that you had prior involvement in that 16 formed your opinions in this case? 17 MS. ALLEN: Asked and answered. 18 <b>A As I said, those are for confidential 19 clients.</b> 20 Q (By Mr. Getzoff) Well, I mean you can't 21 have it both ways. You can't say you've got 22 expertise based on past experience but then say 23 you -- that you relied upon and supports your 24 opinion, but then not tell me what that experience 25 is.</p>
<p>74</p> <p>1 decision? 2 MS. ALLEN: Asked and answered. 3 <b>A Yeah, I think this is the same question. 4 I rely on my expertise based on consumer 5 psychology and the effect of involvement of 6 consumer decision-making based on my 7 doctoral-level training in that subject.</b> 8 Q (By Mr. Getzoff) Did your -- have any of 9 your other cases where you performed a survey or 10 were involved in performing a survey involve 11 credit union or financial -- consumer financial 12 institutions? 13 MS. ALLEN: Vague. 14 <b>A I've done other surveys. I conducted 15 other surveys in a context of financial 16 institutions.</b> 17 Q (By Mr. Getzoff) What surveys were those? 18 <b>A I think I -- those clients are 19 confidential.</b> 20 Q Were they in a litigation context? 21 <b>A Those that I'm thinking of were not.</b> 22 Q Have you been involved in any survey in a 23 litigation context where you measured consumer 24 behavior in signing up for credit union or banking 25 services?</p>	<p>76</p> <p>1 <b>A I didn't say that it developed or informed 2 my expertise. My expertise is based on my 3 understanding of involvement and how it affects 4 consumer decision-making.</b> 5 Q Without revealing any party can you -- can 6 you tell me what you studied, what consumer 7 behavior regarding credit union or banking 8 services you studied? 9 <b>A Some of the topics addressed in that 10 research would have been ask consumers about what 11 information sources they used when making a 12 decision.</b> 13 Q Specifically with respect to signing up 14 for a credit union or a bank? 15 MS. ALLEN: Vague. 16 <b>A I think I can broadly say financial 17 services.</b> 18 Q (By Mr. Getzoff) Does that include -- 19 does that concern a consumer-facing bank services 20 or credit union services? Let me rephrase. 21 (Simultaneous crosstalk.) 22 Q (By Mr. Getzoff) Let me rephrase the 23 question. 24 Did that concern ordinary people that the 25 general public signing up for credit union or bank</p>

Conducted on July 27, 2021

<p>77</p> <p>1 services?</p> <p>2 MS. ALLEN: Vague.</p> <p>3 <b>A I'm not sure what you mean by ordinary</b></p> <p>4 <b>people. I would say representative consumers.</b></p> <p>5 <b>And are you asking about bank or credit card -- or</b></p> <p>6 <b>credit union services? Are you lumping those two?</b></p> <p>7 <b>You asked a lot about credit unions. And I don't</b></p> <p>8 <b>know, are you lumping them together or asking</b></p> <p>9 <b>about them individually?</b></p> <p>10 Q (By Mr. Getzoff) I'm treating them as</p> <p>11 synonymous for purposes of these questions, which</p> <p>12 you do the same. You talk about banking services</p> <p>13 generally to include credit union services, right?</p> <p>14 That's how -- that's how you use that in your</p> <p>15 report. I'm using it the same way.</p> <p>16 <b>A Okay. So you're asking about financial</b></p> <p>17 <b>institutions in general?</b></p> <p>18 Q I'm asking about financial institutions in</p> <p>19 general, but I'm asking about financial</p> <p>20 institutions that the general public would shop</p> <p>21 for and obtain. So I'm not talking about</p> <p>22 professional investors or other types of financial</p> <p>23 services that are out there.</p> <p>24 <b>A I see.</b></p> <p>25 Q Did your prior work involve -- and that's</p>	<p>79</p> <p>1 Credit Union using the Google search engine,</p> <p>2 right?</p> <p>3 <b>A Not the last sentence, but yes, I do see</b></p> <p>4 <b>that.</b></p> <p>5 Q I stand corrected. And then on the next</p> <p>6 page figure 4 you pasted in the results of that</p> <p>7 Internet search. Is that right?</p> <p>8 <b>A Yes.</b></p> <p>9 Q And you said you conducted that Internet</p> <p>10 search on May 10th, 2021?</p> <p>11 <b>A Yes.</b></p> <p>12 Q And then I go forward a few pages in your</p> <p>13 report, paragraph 41 and paragraph 42 you mention</p> <p>14 two other Internet searches that you did. Do you</p> <p>15 see that?</p> <p>16 <b>A I do.</b></p> <p>17 Q I think, unless I missed something, that</p> <p>18 in your report those are the only three Internet</p> <p>19 searches that according to the report that you did</p> <p>20 in this case. Is that right?</p> <p>21 <b>A No.</b></p> <p>22 Q Where else did you -- where else does your</p> <p>23 report describe Internet searches that you were</p> <p>24 on? And I'm sorry, I should have -- are you</p> <p>25 referring to the app store searches?</p>
<p>78</p> <p>1 what I meant by ordinary people, the general</p> <p>2 public. Did your prior work involve behavior of</p> <p>3 the general public in how they go about signing up</p> <p>4 for credit unions or banking services?</p> <p>5 MS. ALLEN: Vague.</p> <p>6 <b>A I would say I have conducted surveys of</b></p> <p>7 <b>consumers who are customers or potential customers</b></p> <p>8 <b>of consumer banking and credit union -- well,</b></p> <p>9 <b>consumer banking services.</b></p> <p>10 Q (By Mr. Getzoff) And did you rely upon</p> <p>11 that prior work for purposes of your work on this</p> <p>12 case?</p> <p>13 <b>A No. I don't think there was a need to.</b></p> <p>14 THE REPORTER: Tim, when you get to</p> <p>15 another good spot, can we take another break?</p> <p>16 MR. GETZOFF: Yeah, we can. This is good</p> <p>17 spot.</p> <p>18 (Break taken from 12:30 p.m. to</p> <p>19 12:42 p.m.)</p> <p>20 Q (By Mr. Getzoff) Dr. Anderson, I want to</p> <p>21 go back to paragraph 35 of your report. It's on</p> <p>22 page 14.</p> <p>23 <b>A I'm there.</b></p> <p>24 Q In the last sentence you talk about an</p> <p>25 Internet search you did of the phrase Elevate</p>	<p>80</p> <p>1 <b>A On page 3, paragraph 12 of my report I</b></p> <p>2 <b>cite the materials that I relied on. And in</b></p> <p>3 <b>bullets vii, viii, and ix all describe Internet</b></p> <p>4 <b>searches.</b></p> <p>5 Q I see. So vii is the websites themselves.</p> <p>6 So that's not a search, right?</p> <p>7 <b>A Well, I believe it is. I was searching --</b></p> <p>8 <b>the websites are listed on the Internet.</b></p> <p>9 Q My question is Internet searches that you</p> <p>10 did. Does bullet -- does Roman numeral little vii</p> <p>11 describe an Internet search that you ran?</p> <p>12 MS. ALLEN: Vague.</p> <p>13 <b>A Yes.</b></p> <p>14 Q (By Mr. Getzoff) Okay. What --</p> <p>15 (Simultaneous crosstalk.)</p> <p>16 Q (By Mr. Getzoff) -- what Internet search</p> <p>17 did you run that's reflected in item vii on page 3</p> <p>18 of your report?</p> <p>19 MS. ALLEN: Vague.</p> <p>20 <b>A This gets to the issue that I</b></p> <p>21 <b>criticized -- one of the criticisms I alleged</b></p> <p>22 <b>against the Poret survey is that searching the</b></p> <p>23 <b>Internet is vague. And in bullet vii I specify</b></p> <p>24 <b>the websites, the companies' websites that I</b></p> <p>25 <b>searched. And those websites are on the Internet.</b></p>



Conducted on July 27, 2021

<p style="text-align: right;">81</p> <p><b>1 So I think it's fair to call that an Internet</b>  <b>2 search.</b>  3 Q (By Mr. Getzoff) What Internet search did  4 you run that's reflected in item vii?  5 MS. ALLEN: Vague.  <b>6 A Can you clarify your question?</b>  7 Q (By Mr. Getzoff) Yeah. You said that  8 item vii reflects an Internet search, right?  <b>9 A Yes.</b>  10 Q So what Internet search did you run that's  11 reflected in item vii? What did you search for?  <b>12 A The website for Elevate Federal Credit</b>  <b>13 Union and the website for Elevation Credit Union.</b>  14 Q So you saying you typed in Elevate Federal  15 Credit Union as a search?  <b>16 A I'm saying I reviewed those websites.</b>  17 Q Sir, I'm asking you about Internet  18 searches, searching, search terms, not websites  19 that --  <b>20 A So you're talking about using an Internet</b>  <b>21 search engine?</b>  22 Q Correct.  <b>23 A Okay. See that's the distinction that</b>  <b>24 Mr. Poret failed to make in his survey and that I</b>  <b>25 criticized in my report. Vii, I believe vii is</b></p>	<p style="text-align: right;">83</p> <p><b>1 A I don't recall if I did or if I just typed</b>  <b>2 in the URL.</b>  3 Q So based on your report it looks like if I  4 look at item vii -- I'm sorry, if I look at  5 item viii and ix and I look at paragraph 35, 41  6 and 42, I see that you searched -- that you used  7 an Internet search engine to search four different  8 phrases. Did I get that right?  <b>9 A To search four different places, what do</b>  <b>10 you mean by that?</b>  11 Q Four different phrases. Four different  12 phrases.  <b>13 A Phrases. You said paragraphs 3 and then</b>  <b>14 41 and 42. Is that correct?</b>  15 Q Correct. Also paragraph 35, although  16 that's the same phrase that you've described on  17 page 3.  <b>18 A If that's all that I listed in my report,</b>  <b>19 then I think you're correct. That's what's</b>  <b>20 listed.</b>  21 Q Okay. And just so we're clear, the  22 phrases that I see that you searched for are  23 Elevate Federal Credit Union, Elevate Credit  24 Union, credit unions in Utah, and credit unions in  25 Colorado. Did I get that right?</p>
<p style="text-align: right;">82</p> <p><b>1 part -- is the type of Internet search. What's</b>  <b>2 listed in viii and ix are -- well, it's not --</b>  <b>3 what's listed in viii would be an Internet search</b>  <b>4 using the search engines that are listed there,</b>  <b>5 Google and Bing.</b>  6 Q So viii actually describes Internet  7 searches, right?  8 MS. ALLEN: Vague.  <b>9 A That's one of those bullets that describe</b>  <b>10 Internet searches. I would say vii, viii, and ix</b>  <b>11 all describe Internet searches.</b>  12 Q (By Mr. Getzoff) Sir, my question was,  13 does viii describe Internet searches?  <b>14 A Yes.</b>  15 Q And it describes two searches. I should  16 say two sets of search terms that you used, right?  <b>17 A Yes.</b>  18 Q And it says you searched those on both the  19 Google search engine and the Bing search engine.  <b>20 A That's right.</b>  21 Q Did you ever search for Elevations Credit  22 Union as a search term?  <b>23 A I don't recall.</b>  24 Q To arrive at the websites reflected in  25 item vii did you use an Internet search engine?</p>	<p style="text-align: right;">84</p> <p><b>1 A Those are the ones that I think I listed</b>  <b>2 in my report, yes.</b>  3 Q And you don't remember if you ever  4 searched for Elevations Credit Union, right?  5 MS. ALLEN: Asked and answered.  <b>6 A Yeah, I think I said, as I sit here today,</b>  <b>7 I don't recall.</b>  8 Q (By Mr. Getzoff) Were there any other  9 phrases -- so was part of your work on --  <b>10 A Sorry, that's -- that's not correct. That</b>  <b>11 answer is not correct. As I said before, I did</b>  <b>12 search on the Internet for Elevations Credit</b>  <b>13 Union. But I think you're using Internet search</b>  <b>14 to mean using a search engine. And as I answered</b>  <b>15 before, I don't recall.</b>  16 Q So my questions on Internet searches are,  17 did you use an Internet search engine using a  18 phrase or keyword to search? And you don't recall  19 one way or the other whether you ever searched  20 Elevations Credit Union, right?  <b>21 A Using the Internet search engine I don't</b>  <b>22 recall.</b>  23 Q Can you recall other than the four phrases  24 that we just identified that's reflected in your  25 report in the locations we just talked about, can</p>

Conducted on July 27, 2021

<p>85</p> <p>1 you recall any other search terms that you used</p> <p>2 using an Internet search engine as part of your</p> <p>3 work for this case?</p> <p>4 MS. ALLEN: Asked and answered.</p> <p>5 <b>A Not as I sit here today, no.</b></p> <p>6 Q (By Mr. Getzoff) In page 3 it says you</p> <p>7 searched Elevate Federal Credit Union in addition</p> <p>8 for Elevate Credit Union. But in your report you</p> <p>9 only talk about the results for Elevate Credit</p> <p>10 Union, right?</p> <p>11 <b>A Well, on page 3 it does say I searched for</b></p> <p>12 <b>both of those terms on Google and Bing and on the</b></p> <p>13 <b>Google Play app store. So that part is correct.</b></p> <p>14 <b>And the other part of your question was about the</b></p> <p>15 <b>results that I provided in my report. Is that</b></p> <p>16 <b>right?</b></p> <p>17 Q Correct. I don't see anywhere in your</p> <p>18 report where you talk about what results you got</p> <p>19 when you searched Elevate Federal Credit Union.</p> <p>20 <b>A I don't know that I did provide that in my</b></p> <p>21 <b>report. In my report I provided the results from</b></p> <p>22 <b>my search of Elevate Credit Union because that's</b></p> <p>23 <b>the term that Mr. Poret used in his survey.</b></p> <p>24 Q Do you know what the results were for the</p> <p>25 search you did of Elevate Federal Credit Union?</p>	<p>87</p> <p>1 don't recall whether you did searches more than</p> <p>2 once or whether you just did them once and this is</p> <p>3 the result?</p> <p>4 MS. ALLEN: Objection, mischaracterizes</p> <p>5 prior testimony.</p> <p>6 <b>A Well, I know that I searched multiple</b></p> <p>7 <b>times, and there's -- that's indicated by my</b></p> <p>8 <b>report.</b></p> <p>9 Q (By Mr. Getzoff) Well, so let me drill</p> <p>10 into that. So let's talk about the search you did</p> <p>11 for Elevate Credit Union, which you refer to on</p> <p>12 paragraph 35. And then it's pasted -- the results</p> <p>13 are pasted in figure 4. Are you with me?</p> <p>14 <b>A Yes.</b></p> <p>15 Q So you -- this particular search you said</p> <p>16 you retrieved on May 10th, 2021. Do you see that?</p> <p>17 <b>A Yes.</b></p> <p>18 Q Is this -- for your search of Elevate</p> <p>19 Credit Union using the Google search engine, is</p> <p>20 this the first and only time you did that search?</p> <p>21 <b>A I don't know.</b></p> <p>22 Q Do you recall doing a search earlier in</p> <p>23 your work as part of your just general</p> <p>24 investigation or getting up to speed and then</p> <p>25 zeroing in when it got closer to report to doing</p>
<p>86</p> <p>1 MS. ALLEN: (Indiscernible.)</p> <p>2 THE REPORTER: I'm sorry, what did you</p> <p>3 say?</p> <p>4 MS. ALLEN: I said vague.</p> <p>5 THE REPORTER: Thank you.</p> <p>6 <b>A No. I don't remember all the search</b></p> <p>7 <b>results that appeared when I conducted that</b></p> <p>8 <b>search.</b></p> <p>9 Q (By Mr. Getzoff) Do you have -- do you</p> <p>10 still have a copy saved somewhere of that search</p> <p>11 you did for Elevate Federal Credit Union?</p> <p>12 <b>A I don't know.</b></p> <p>13 Q Do you have copies of any of the searches?</p> <p>14 Other than what you pasted in your report, do you</p> <p>15 have copies of the results of any of the Internet</p> <p>16 searches that you did in this case?</p> <p>17 MS. ALLEN: Vague.</p> <p>18 <b>A I don't know.</b></p> <p>19 Q (By Mr. Getzoff) Did you do these</p> <p>20 searches across multiple days to see if the</p> <p>21 results changed, or did you just do them once?</p> <p>22 MS. ALLEN: Compound.</p> <p>23 <b>A I don't recall the days other than what</b></p> <p>24 <b>I've specified them.</b></p> <p>25 Q (By Mr. Getzoff) And to be clear, you</p>	<p>88</p> <p>1 this particular search?</p> <p>2 MS. ALLEN: Vague.</p> <p>3 <b>A No, I don't recall.</b></p> <p>4 Q (By Mr. Getzoff) In your experience do</p> <p>5 you know whether Internet search results are</p> <p>6 static or do they change over time?</p> <p>7 <b>A I don't know if there's one answer to</b></p> <p>8 <b>that. I think they can change over time but don't</b></p> <p>9 <b>necessarily.</b></p> <p>10 Q Are you -- I think we established this.</p> <p>11 Do you plan to have any sort of expertise as to</p> <p>12 how Internet search engines change over time or</p> <p>13 what -- under what circumstances results can</p> <p>14 change over time?</p> <p>15 MS. ALLEN: Compound and asked and</p> <p>16 answered.</p> <p>17 <b>A Sorry, would you restate that?</b></p> <p>18 Q (By Mr. Getzoff) Yeah. Do you claim have</p> <p>19 any expertise into the circumstances by which an</p> <p>20 Internet search result can change over time?</p> <p>21 MS. ALLEN: Same objection.</p> <p>22 <b>A Not from an expert perspective.</b></p> <p>23 Q (By Mr. Getzoff) How about person using</p> <p>24 the Internet perspective?</p> <p>25 <b>A Right.</b></p>

Conducted on July 27, 2021

<p>89</p> <p>1 MS. ALLEN: Vague.</p> <p>2 <b>A And as someone who conducts research that</b></p> <p>3 <b>can involve using Internet search engines but not</b></p> <p>4 <b>as -- not as someone who I would say is an expert</b></p> <p>5 <b>in the way that Internet search algorithms work.</b></p> <p>6 Q (By Mr. Getzoff) Did you review searches</p> <p>7 that Hal Poret did more recently that we produced</p> <p>8 in this case that show different results on Google</p> <p>9 than you portray your report in figure 4?</p> <p>10 MS. ALLEN: And, Tim, I think -- I don't</p> <p>11 know if we need to discussion this. But I'm going</p> <p>12 to object to any use of those documents. They're</p> <p>13 subject to, you know, our pending short form</p> <p>14 discovery order, which is essentially asking that</p> <p>15 they be excluded. And I don't think it's</p> <p>16 appropriate here and we're not willing to waive</p> <p>17 our objections here to let them be used in this</p> <p>18 deposition.</p> <p>19 MR. GETZOFF: Well, I'll give you a</p> <p>20 standing objection that preserves your objection.</p> <p>21 MS. ALLEN: I don't think that's</p> <p>22 sufficient. I think that that effectually waives</p> <p>23 lot of the arguments we have. And it's not</p> <p>24 something that I think we should bring into</p> <p>25 evidence here. It wasn't part of the report our</p>	<p>91</p> <p>1 properly in the record at this point. And I don't</p> <p>2 think we can allow the witness to be testifying</p> <p>3 against about them.</p> <p>4 MR. GETZOFF: I can show this witness</p> <p>5 anything I want for purposes of rebuttal and for</p> <p>6 purposes of --</p> <p>7 MS. ALLEN: Those documents haven't been</p> <p>8 entered as rebuttal. Rebuttal had to be done</p> <p>9 30 days after his testimony -- or after his report</p> <p>10 rather. It certainly wasn't that. It wasn't in</p> <p>11 response to any discovery requests.</p> <p>12 MR. GETZOFF: So let's do this. I'm going</p> <p>13 to mark -- actually, these documents were already</p> <p>14 admitted as deposition exhibits by your</p> <p>15 co-counsel, previously marked as Exhibit 73 in Hal</p> <p>16 Poret's deposition.</p> <p>17 (Exhibit No. 73 was previously marked for</p> <p>18 identification and is attached to the transcript.)</p> <p>19 MR. GETZOFF: I have put Exhibit 73 in the</p> <p>20 chat room.</p> <p>21 MS. ALLEN: I'm going to instruct my</p> <p>22 witness not to open that document. I think it's</p> <p>23 inappropriate to try to use these documents, which</p> <p>24 are currently essentially the subject of a</p> <p>25 protective order. That's not an -- this is not an</p>
<p>90</p> <p>1 expert reviewed in forming his opinions. It</p> <p>2 shouldn't be entered into evidence here today. I</p> <p>3 don't want to allow this deposition to be</p> <p>4 basically a back doorway to get this -- these</p> <p>5 documents in when they should otherwise be</p> <p>6 excluded.</p> <p>7 MR. GETZOFF: It's not a back doorway.</p> <p>8 It's -- you have the right to make objections</p> <p>9 during this deposition as you've been doing this</p> <p>10 entire day. And that preserves your objections.</p> <p>11 That's the point of making the objection.</p> <p>12 MS. ALLEN: I understand.</p> <p>13 MR. GETZOFF: I only get this witness --</p> <p>14 this is my only opportunity to depose him. If</p> <p>15 your objections are upheld then all of this -- any</p> <p>16 testimony subject to the objections would -- will</p> <p>17 be stricken. That's the whole point.</p> <p>18 MS. ALLEN: I understand. And we would be</p> <p>19 willing to reopen this deposition for the limited</p> <p>20 purpose of questioning about those documents</p> <p>21 should that discovery rule go in your favor. But</p> <p>22 at this point allowing them to be entered is</p> <p>23 essentially a waiver of a lot of our objections.</p> <p>24 It's very problematic in terms of the merits of</p> <p>25 our motion. And those documents just aren't</p>	<p>92</p> <p>1 appropriate way to enter these documents. And we</p> <p>2 are willing to reopen this deposition for the</p> <p>3 purposes of this -- these questions.</p> <p>4 MR. GETZOFF: Your own counsel marked</p> <p>5 these documents as a deposition exhibit, and</p> <p>6 you're saying I can't use that same deposition</p> <p>7 exhibit against your expert? That's your --</p> <p>8 MS. ALLEN: I don't know -- I don't know</p> <p>9 the purposes for which -- no. Yeah, that's</p> <p>10 exactly what I'm saying. I don't think this</p> <p>11 witness can be testifying against -- about these</p> <p>12 documents. They're not our documents. We don't</p> <p>13 even really know where they came from. I don't</p> <p>14 think that they're appropriate before -- they're</p> <p>15 not going to be appropriately before the court.</p> <p>16 And they're subject to a protective order right</p> <p>17 now.</p> <p>18 MR. GETZOFF: They're not subject to a</p> <p>19 protective order. They're subject to a motion you</p> <p>20 filed.</p> <p>21 MS. ALLEN: I'm sorry. I'm sorry, a</p> <p>22 pending -- essentially a pending protective order.</p> <p>23 They're subject to that.</p> <p>24 MR. GETZOFF: They're the subject of a</p> <p>25 motion that you filed on Friday.</p>

Conducted on July 27, 2021

<p style="text-align: right;">93</p> <p>1 MS. ALLEN: Correct.</p> <p>2 MR. GETZOFF: After your co-counsel</p> <p>3 already used these same documents with my expert</p> <p>4 and marked them as a deposition exhibit. And</p> <p>5 you're saying I can't use that same deposition</p> <p>6 exhibit against -- or with your expert because you</p> <p>7 chose to file a motion in between my expert's</p> <p>8 deposition and your expert's deposition?</p> <p>9 MS. ALLEN: And in addition during all</p> <p>10 that time when there were discussions going about</p> <p>11 the inappropriateness of these documents. So,</p> <p>12 yes, that is what I'm saying.</p> <p>13 Q (By Mr. Getzoff) Dr. Anderson, have you</p> <p>14 seen the Google searches run by Hal Poret dated</p> <p>15 June 15?</p> <p>16 MS. ALLEN: And, Tim, I'm going to just</p> <p>17 object. We don't know that those are Google</p> <p>18 searches run by Hal. I don't think that's what</p> <p>19 the documents say.</p> <p>20 MR. GETZOFF: Kirsten, you are making</p> <p>21 speaking objections now. You can make your</p> <p>22 objection.</p> <p>23 MS. ALLEN: Okay. Well, my objection is</p> <p>24 an instruction as for him not to look at those</p> <p>25 documents. I'm happy -- I'm happy to reopen this</p>	<p style="text-align: right;">95</p> <p>1 about --</p> <p>2 MS. ALLEN: I would like to reach an</p> <p>3 agreement with you that we can reopen this</p> <p>4 deposition if the court rules against us in this</p> <p>5 short form protective order. I don't think it</p> <p>6 would be overly onerous. It's not that many</p> <p>7 documents. This is all via Zoom. I'm just doing</p> <p>8 what I need to do to protect my client and to not</p> <p>9 waive our objections, which is essentially what</p> <p>10 this would be.</p> <p>11 MR. GETZOFF: If you want to instruct him</p> <p>12 not to answer, you can instruct him not to answer.</p> <p>13 I think that's completely inappropriate and, in</p> <p>14 fact, sanctionable because that's what the whole</p> <p>15 objection process is for. And you can make your</p> <p>16 objection. You have made your objection. But the</p> <p>17 witness is here. We are here for this deposition.</p> <p>18 And I'm going to make my -- my record. And if you</p> <p>19 want to instruct him not to answer, you can do</p> <p>20 that at your peril. But we're going to proceed.</p> <p>21 MS. ALLEN: I am going to instruct him not</p> <p>22 answer about these particular documents. I'm very</p> <p>23 happy --</p> <p>24 MR. GETZOFF: Okay. Let's take this one</p> <p>25 question at a time.</p>
<p style="text-align: right;">94</p> <p>1 deposition for the purposes of the questioning</p> <p>2 about these documents. But I do not want to allow</p> <p>3 my witness to do that right now.</p> <p>4 Q (By Mr. Getzoff) Dr. Anderson, have you</p> <p>5 looked at, at any time, the documents that we</p> <p>6 produced in this case that show Google Internet</p> <p>7 searches run by Hal Poret in June of this year</p> <p>8 after your rebuttal report?</p> <p>9 MS. ALLEN: And all these same objections.</p> <p>10 Tim, I don't -- I mean is it -- how can we -- how</p> <p>11 can we deal with this? I think that --</p> <p>12 MR. GETZOFF: Kirsten, I'm asking him this</p> <p>13 question is has he seen these documents before. I</p> <p>14 don't know what your objection would be, but if</p> <p>15 you want to make --</p> <p>16 MS. ALLEN: My objection is that we're not</p> <p>17 talking about these documents during this</p> <p>18 deposition until this short form protective order</p> <p>19 is decided.</p> <p>20 MR. GETZOFF: I'm asking him if he's seen</p> <p>21 them before.</p> <p>22 MS. ALLEN: Yeah. And that's questioning</p> <p>23 him about the documents.</p> <p>24 MR. GETZOFF: Are you instructing him not</p> <p>25 to answer whether he's even seen these questions</p>	<p style="text-align: right;">96</p> <p>1 Q (By Mr. Getzoff) Dr. Anderson, have you</p> <p>2 seen the Google search reports that Hal Poret ran</p> <p>3 and we produced that occurred after your rebuttal</p> <p>4 report in this case?</p> <p>5 MS. ALLEN: I'm going to instruct him not</p> <p>6 to answer subject to having this reopened. And</p> <p>7 I'll just repeat that to every question about</p> <p>8 these documents.</p> <p>9 MR. GETZOFF: I have put into the chat</p> <p>10 room Exhibit 73, which was previously marked by</p> <p>11 plaintiff's counsel in Hal Poret's deposition.</p> <p>12 Are you instructing him not to look at that</p> <p>13 exhibit?</p> <p>14 MS. ALLEN: That is correct.</p> <p>15 MR. GETZOFF: And if I asked him this</p> <p>16 exhibit is Bates number ELEVATIONS004596 to 4625,</p> <p>17 about 30 pages. Counsel, are you saying that</p> <p>18 every question I ask about the contents and</p> <p>19 substance of these documents you're instructing</p> <p>20 him not to answer?</p> <p>21 MS. ALLEN: Correct.</p> <p>22 Q (By Mr. Getzoff) Dr. Anderson, I'm</p> <p>23 marking a new exhibit.</p> <p>24 (Exhibit No. 77 was marked for</p> <p>25 identification and is attached to the transcript.)</p>

Conducted on July 27, 2021

<p>97</p> <p>1 Q It is Exhibit 77 that I've just put into 2 the chat room.</p> <p>3 MS. ALLEN: And I can -- can I assume this 4 is not the same document?</p> <p>5 MR. GETZOFF: It's not any searches that 6 Hal Poret performed, and it's not part of the 7 searches that Hal Poret performed.</p> <p>8 Q (By Mr. Getzoff) Dr. Anderson, do you see 9 Exhibit 77?</p> <p>10 <b>A I haven't opened it yet. I don't know if 11 this was going to be objected to.</b></p> <p>12 MS. ALLEN: Yeah, let me -- let me have a 13 quick look I guess. And I guess I'll just make 14 the general objection that to the extent this is 15 another way to try to introduce the same -- the 16 same search, it's subject to the same objections. 17 But I will not instruct my witness not to look at 18 these documents. They're not the subject of that 19 short form protective order.</p> <p>20 Q (By Mr. Getzoff) Dr. Anderson?</p> <p>21 THE WITNESS: So you'd like me to open the 22 document?</p> <p>23 MS. ALLEN: Yes.</p> <p>24 Q (By Mr. Getzoff) Dr. Anderson, I'm going 25 to represent to you that this is a -- the</p>	<p>99</p> <p>1 <b>A Okay. I see indications that that may be 2 the case. I'll accept your representation.</b></p> <p>3 Q Okay. And do you see that for this search 4 the first result is an advertisement for 5 Elevations Credit Union. Do you see that?</p> <p>6 <b>A I see that search result.</b></p> <p>7 Q And then the second search result is 8 Elevate Credit Union, the plaintiff, your client 9 in this case, right?</p> <p>10 MS. ALLEN: Tim, can I just say I'm just 11 going to say there's a lack of foundation -- or 12 objection to each these. I don't want to keep 13 interrupting your flow.</p> <p>14 MR. GETZOFF: I'll give you a standing 15 foundation objection for all my questions 16 regarding Exhibit 77.</p> <p>17 MS. ALLEN: Thank you.</p> <p>18 Q (By Mr. Getzoff) This second search 19 result is Elevate Credit Union, which is the 20 plaintiff in this case, right?</p> <p>21 <b>A I see that one.</b></p> <p>22 Q And then the third search result goes back 23 to Elevations Credit Union, the defendant in this 24 case, right?</p> <p>25 <b>A I see that.</b></p>
<p>98</p> <p>1 result --</p> <p>2 <b>A (Indiscernible.)</b></p> <p>3 Q Let me know when you're done.</p> <p>4 <b>A I have it open.</b></p> <p>5 Q Okay. I'm going to represent to you that 6 this is a printout of the Internet search report 7 that I ran yesterday for the phrase Elevate Credit 8 Union on the Google search engine. Do you see 9 that?</p> <p>10 MS. ALLEN: And I'm just going to 11 generally object to foundation. And I won't do 12 speaking objections.</p> <p>13 <b>A So what was your question? Sorry, I lost 14 the question.</b></p> <p>15 Q (By Mr. Getzoff) First, just do you see 16 the document?</p> <p>17 <b>A Yeah. It's two pages long, correct.</b></p> <p>18 Q Right. And do you see at the top it shows 19 the -- it shows that it appears to be search 20 results from Google of the phrase Elevate Credit 21 Union. Do you see that?</p> <p>22 MS. ALLEN: Same objection.</p> <p>23 <b>A Are you representing that to me?</b></p> <p>24 Q (By Mr. Getzoff) Yes. I'm representing 25 that to you.</p>	<p>100</p> <p>1 Q And then the other three on this page go 2 back to the plaintiff Elevate Credit Union. Do 3 you see that?</p> <p>4 <b>A No. I see the on fourth one it looks like 5 it's for LinkedIn.</b></p> <p>6 Q I stand corrected. Yeah, the fourth one 7 is for LinkedIn for the plaintiff, right?</p> <p>8 <b>A I see it says Elevate Credit Union. And 9 there's a vertical line. And it says LinkedIn. 10 And looks like the URL leads to LinkedIn.</b></p> <p>11 Q The next one seems -- appears to be a 12 newspaper article about this lawsuit.</p> <p>13 <b>A I see that.</b></p> <p>14 Q And then the next one is a Facebook page 15 for Elevate Credit Union.</p> <p>16 <b>A I see that as well.</b></p> <p>17 Q Dr. Anderson, in view of the -- what the 18 authors discussed in that Swann article, 19 Exhibit 76 that we looked at earlier, would these 20 search results satisfy the competitive proximity 21 requirement for conducting a Squirt survey --</p> <p>22 MS. ALLEN: Objection.</p> <p>23 Q (By Mr. Getzoff) -- confusion?</p> <p>24 MS. ALLEN: Calls for speculation.</p> <p>25 <b>A No.</b></p>



Conducted on July 27, 2021

<p>101</p> <p>1 Q (By Mr. Getzoff) Why not?</p> <p>2 A First of all, I should say I don't know</p> <p>3 how this search was conducted. So I can't really</p> <p>4 discuss -- I can't rely on these search results</p> <p>5 without knowing how they were conducted, whether</p> <p>6 this search result that we're looking at in this</p> <p>7 document may be affected by previous searches</p> <p>8 by -- on this device or by the person logged in on</p> <p>9 the computer.</p> <p>10 So there are -- there's information I</p> <p>11 don't have about how this search was conducted.</p> <p>12 But even if I -- even if I were to find that this</p> <p>13 was conducted in a fair and impartial manner</p> <p>14 unbiased by browser history or a cache that would</p> <p>15 retain previous search results, this would not</p> <p>16 satisfy the criteria that Swann and Henn in their</p> <p>17 article list for demonstrating proximity for</p> <p>18 several reasons.</p> <p>19 One is the criteria that Swann and Henn</p> <p>20 list indicate that a search to demonstrate</p> <p>21 proximity using an Internet search engine the</p> <p>22 search should use -- should be a keyword search</p> <p>23 for the category, not for a particular brand. And</p> <p>24 this is a search for Elevate Credit Union. It's</p> <p>25 one of the marks at issue in this case.</p>	<p>103</p> <p>1 A I don't remember if it was the first thing</p> <p>2 I said, but that's one of the points that I made.</p> <p>3 Q And you said that -- well, let's go to the</p> <p>4 Swann article. Could you go back to Exhibit 76?</p> <p>5 A Okay.</p> <p>6 Q And let's look at footnote 42, which is on</p> <p>7 page 680.</p> <p>8 A I see it.</p> <p>9 Q And in this footnote they say on the</p> <p>10 second sentence, quote, We do not suggest that a</p> <p>11 Squirt survey is appropriate only where search</p> <p>12 terminology uses generic or highly descriptive</p> <p>13 terms of the product category.</p> <p>14 You see that, right?</p> <p>15 A That's one sentence in that footnote.</p> <p>16 Q Correct.</p> <p>17 A Yes, I see that.</p> <p>18 Q It goes to say, Indeed an Internet user in</p> <p>19 a particular product or service category may use</p> <p>20 brand specific search terminology rather than</p> <p>21 generic product terminology.</p> <p>22 And it goes on with -- just stop right</p> <p>23 there. You're with me so far, right?</p> <p>24 A I'm with you so far. But if you stop</p> <p>25 right there, we're not --</p>
<p>102</p> <p>1 Swann and Henn acknowledge that a search</p> <p>2 for one of the marks at issue in a matter may be</p> <p>3 appropriate if certain conditions are met that</p> <p>4 aren't met here. And those conditions are that,</p> <p>5 first of all, the search term that the mark used</p> <p>6 as a keyword search must have a sufficient level</p> <p>7 of consumer awareness, which Mr. Poret says he</p> <p>8 Elevate does not. And second of all, that search</p> <p>9 term must be a term that consumers would typically</p> <p>10 or commonly search for.</p> <p>11 And I think by Mr. Poret I think in his</p> <p>12 report he indicated that if a consumer isn't aware</p> <p>13 of the aware of the term, like he said, not aware</p> <p>14 of Elevate in this matter, that they can't search</p> <p>15 for it. It's not something they can logically do.</p> <p>16 So it does not -- this search does not meet the</p> <p>17 criteria that Swann and Henn laid out regarding</p> <p>18 justifying proximity. And there are others</p> <p>19 reasons why it doesn't justify proximity as well.</p> <p>20 Q For the -- so your first reason that you</p> <p>21 explained was, and you had a lot of explanation,</p> <p>22 but the start of it was because the search was for</p> <p>23 the brand name or for one of the marks as opposed</p> <p>24 to a generic or descriptive category search. Is</p> <p>25 that accurate?</p>	<p>104</p> <p>1 (Simultaneous crosstalk.)</p> <p>2 Q (By Mr. Getzoff) The next phrase are the</p> <p>3 conditions -- I think that was your word -- that</p> <p>4 you said must be present in order for a brand</p> <p>5 specific search terminology to be appropriate,</p> <p>6 right?</p> <p>7 A According to what they said in this</p> <p>8 article, yes.</p> <p>9 Q And there's two conditions, right?</p> <p>10 A That they listed here, yes.</p> <p>11 Q Yeah. And in your description you only</p> <p>12 mentioned one of the conditions. You said a known</p> <p>13 brand or familiarity with a known brand. And then</p> <p>14 you said -- Mr. Poret said there wasn't sufficient</p> <p>15 familiarity on brands. So you concluded that this</p> <p>16 condition wasn't met. Is that right?</p> <p>17 MS. ALLEN: Objection, mischaracterizes</p> <p>18 the report.</p> <p>19 A There's two conditions in that sentence.</p> <p>20 And there is more to this footnote that provides</p> <p>21 other conditions that I said had not been met</p> <p>22 here.</p> <p>23 Q (By Mr. Getzoff) The other condition that</p> <p>24 you didn't mention it says, quote, Or recent</p> <p>25 exposure through EG advertising to a new brand.</p>

Conducted on July 27, 2021

<p>105</p> <p>1 Right?</p> <p>2 <b>A I see that.</b></p> <p>3 Q Do you agree with that?</p> <p>4 <b>A I see that they have written that, yes.</b></p> <p>5 Q Do you agree with their statement in this</p> <p>6 footnote by these authors that brand specific</p> <p>7 search terminology is appropriate if you have</p> <p>8 either familiarity with a known brand or recent</p> <p>9 exposure such as to advertising to a new brand?</p> <p>10 <b>A I think if that advertising exposure, that</b></p> <p>11 <b>recent exposure, creates as sufficient level of</b></p> <p>12 <b>awareness for the consumer, then that makes sense.</b></p> <p>13 Q Do you -- did you conduct any sort of</p> <p>14 analysis of what sort of advertising Elevate</p> <p>15 Federal Credit Union does?</p> <p>16 <b>A No.</b></p> <p>17 Q Do you have any idea what level of</p> <p>18 advertising Elevate Federal Credit Union engages</p> <p>19 in?</p> <p>20 MS. ALLEN: Vague.</p> <p>21 <b>A I don't know what you mean by level, but I</b></p> <p>22 <b>haven't analyzed their advertising.</b></p> <p>23 Q (By Mr. Getzoff) By level I mean the type</p> <p>24 of advertising or the extent of advertising. Do</p> <p>25 you have any idea what they -- what Federal --</p>	<p>107</p> <p>1 search results from that exhibit are conducted</p> <p>2 reliably and in an unbiased manner, then those</p> <p>3 would not be sufficient to demonstrate that</p> <p>4 there's proximity that would support the use of</p> <p>5 the Squirt survey in this matter.</p> <p>6 Q Even -- even if the conditions in</p> <p>7 footnote 42 were satisfied as well. That was</p> <p>8 your -- that was your initial objection. So if we</p> <p>9 resolve that objection, do we now have an</p> <p>10 appropriate Squirt survey or do you have more</p> <p>11 objections?</p> <p>12 <b>A Well, I don't think that one search can</b></p> <p>13 <b>satisfy the objection, the conditions in</b></p> <p>14 <b>footnote 42, because one of those conditions</b></p> <p>15 <b>indicates that the search should be reasonably</b></p> <p>16 <b>common. Or that -- and that the search results</b></p> <p>17 <b>would be reasonably common. I don't think that</b></p> <p>18 <b>that's -- not the search results but the search</b></p> <p>19 <b>term would be reasonably common.</b></p> <p>20 <b>I don't think that can be satisfied in</b></p> <p>21 <b>this case. It doesn't make logical sense that</b></p> <p>22 <b>consumers would commonly search for a name that</b></p> <p>23 <b>they aren't familiar with. But even then there</b></p> <p>24 <b>are other reasons why the -- the search conducted</b></p> <p>25 <b>in Exhibit 77 would not be sufficient.</b></p>
<p>106</p> <p>1 Elevate Federal Credit Union does by way of type</p> <p>2 or extent of advertising?</p> <p>3 MS. ALLEN: Vague.</p> <p>4 <b>A No.</b></p> <p>5 Q (By Mr. Getzoff) Do you know what their</p> <p>6 advertising budget or expenditures have been?</p> <p>7 <b>A No.</b></p> <p>8 Q If these conditions are satisfied, the</p> <p>9 ones described in paragraph 42 of the Swann</p> <p>10 report, would you then agree that the proximity of</p> <p>11 the two brands in Exhibit 77 a Google search is</p> <p>12 sufficient to justify a Squirt survey?</p> <p>13 <b>A No. I don't think you can rely on</b></p> <p>14 <b>Exhibit 77 to justify this, a Squirt survey.</b></p> <p>15 Q Well, yeah, your objection that you don't</p> <p>16 know where 77 comes from and whether it's unbiased</p> <p>17 has been noted. And I'm not -- I'm not asking to</p> <p>18 you set that aside. If -- if Exhibit 77 is taken</p> <p>19 at face value -- and I'm just asking you to assume</p> <p>20 that because you don't know -- if the conditions</p> <p>21 in the Swann article in the footnote we just</p> <p>22 looked at are satisfied, do these search results</p> <p>23 justify a Squirt survey?</p> <p>24 <b>A Thank you for adding the caveat. But</b></p> <p>25 <b>that's not why I answered no. No. Even if these</b></p>	<p>108</p> <p>1 Q What are those other reasons?</p> <p>2 <b>A I haven't had a lot of time to look</b></p> <p>3 <b>through this Exhibit. But based on my, you know,</b></p> <p>4 <b>review, you walked me through some of these, the</b></p> <p>5 <b>information on this first page. The second from</b></p> <p>6 <b>the bottom search results it says Elevate FCU and</b></p> <p>7 <b>Elevations Credit Union in trademark tug-of.</b></p> <p>8 <b>That search result seems -- I think you</b></p> <p>9 <b>described it as probably a news article or some</b></p> <p>10 <b>news story about this dispute. It's my</b></p> <p>11 <b>understanding that search results on a -- on a</b></p> <p>12 <b>search engine like Google can be affected by news</b></p> <p>13 <b>articles like this. And this article is putting</b></p> <p>14 <b>these two parties in juxtaposition with each</b></p> <p>15 <b>other. And that is appearing in the search</b></p> <p>16 <b>results, which may be affecting the search results</b></p> <p>17 <b>that this algorithm is generating.</b></p> <p>18 <b>I don't think that would it be appropriate</b></p> <p>19 <b>to base a decision of proximity based on search</b></p> <p>20 <b>results that are affected by the dispute. That's</b></p> <p>21 <b>one reason why I don't think these are sufficient.</b></p> <p>22 Q I asked about that -- or do you want to</p> <p>23 list them all first?</p> <p>24 <b>A I'll give another. This is one search</b></p> <p>25 <b>result -- sorry, this is one search or one</b></p>



Conducted on July 27, 2021

<p>109</p> <p>1 document of, you know, one -- I know it's two 2 pages in the document. But I think that we said 3 it's the first -- it's one -- maybe I'm assuming 4 this is the first page of search results for this 5 search term.</p> <p>6 I don't think that that is sufficient to 7 show one search and one page to show that there's 8 proximity when the standard is that this should be 9 a common or typical occurrence. This is the 10 equivalent of providing a survey and only giving 11 the answers that are favorable to -- to your 12 arguments in the case and not any of the search 13 results or the survey results that are 14 unfavorable.</p> <p>15 The way to justify proximity is to conduct 16 multiple searches, a large number of searches, and 17 record whether or not there's proximity, you know, 18 what percent of the searches indicate that there's 19 proximity. And then the court can determine 20 whether that percentage is frequent enough or 21 common or typical enough to justify that there's 22 proximity.</p> <p>23 It doesn't seem because of this dispute 24 making its way into the media that that kind of an 25 analysis can be done on an unbiased manner</p>	<p>111</p> <p>1 authorities in these articles, the Swann and Henn 2 article, that we've reviewed.</p> <p>3 Q You would agree with me that the Swann and 4 Henn article is a reliable authoritative source on 5 that topic, right?</p> <p>6 A On the topic of proximity for --</p> <p>7 Q An Internet --</p> <p>8 A -- likelihood of confusion or Squirt 9 surveys?</p> <p>10 Q Yes.</p> <p>11 A I would say so.</p> <p>12 Q Have you run -- since the time that you 13 ran the search, it's figure 4 of your report 14 page 15 that you ran on May 10th, have you run 15 that same search any time since then to see if it 16 changed, to see if the results changed?</p> <p>17 A I don't recall doing so.</p> <p>18 Q You know, I'm looking at your search 19 results, if you look at figure 4.</p> <p>20 A I see figure 4.</p> <p>21 Q That same news article is in your search 22 results. Do you see that?</p> <p>23 A I do.</p> <p>24 Q When you ran this search -- well, so let 25 me ask you about all of the searches that you ran.</p>
<p>110</p> <p>1 anymore. That's something that Mr. Poret should 2 have done when he designed his survey. And 3 according to my understanding of his deposition 4 transcript, he said that he didn't keep those kind 5 of records. So we don't have any way to evaluate 6 that.</p> <p>7 Q You didn't keep your records either, 8 though, did you, Dr. Anderson?</p> <p>9 MS. ALLEN: Objection, misstates prior 10 testimony.</p> <p>11 A I may have reported everything that I 12 searched for.</p> <p>13 Q (By Mr. Getzoff) But you didn't --</p> <p>14 A And --</p> <p>15 Q -- you didn't produce the results of any 16 of those searches other than the one that you 17 pasted, right?</p> <p>18 A Yes, I did. It's in my report. But it's 19 also not my burden to demonstrate that there's a 20 lack of proximity. It's Mr. Poret's burden to 21 demonstrate that there is sufficient proximity. 22 And one page of search results for a 23 brand-specific term for a brand that he himself 24 says has little consumer awareness doesn't seem to 25 meet the standards for proximity according to the</p>	<p>112</p> <p>1 I think -- I think we established that you ran -- 2 you searched four different phrases using search 3 engines, right?</p> <p>4 A That I've noted in my report and that I 5 can recall today, that's correct.</p> <p>6 Q Right. And you may have done more, but 7 you don't remember one way or the other, right?</p> <p>8 A That's correct.</p> <p>9 Q Each time did you use the same device for 10 each of the searches?</p> <p>11 A I don't recall.</p> <p>12 Q Did you use the same browser each time?</p> <p>13 A I don't recall.</p> <p>14 Q Can you recall any of the browsers that 15 you used?</p> <p>16 A When I look at figure 6 and figure 7, this 17 is page 27 of my report, I don't recall what 18 browser this is for these two figures. But I 19 think that based on the format of the top line 20 where you see the backwards arrow in the top left 21 and the forward arrow, which is kind of grayed out 22 and the refresh button and the home button and the 23 URL, that row, we can probably determine whether 24 that -- what browser that -- that is.</p> <p>25 Q Each time you ran a search, the searches</p>

Conducted on July 27, 2021

<p>113</p> <p>1 that we're talking, about did you clear your cache 2 and your browsing history beforehand? 3 <b>A I don't recall every search. But I do</b> 4 <b>know that at some -- some searches or at least one</b> 5 <b>search I deliberately did not clear the cache to</b> 6 <b>make the search conservative. In other words, if</b> 7 <b>someone -- my search result would -- would account</b> 8 <b>for the previous search term. And despite that</b> 9 <b>conservative attempt at a search, I did not find</b> 10 <b>the same results or results for the plaintiff and</b> 11 <b>defendant in the same list or the same page of</b> 12 <b>search results.</b> 13 Q So let me just wrap and then we'll break 14 for lunch. 15 So not clearing the cache or the browsing 16 history, that could influence the search one way 17 or the other. I mean you don't know how -- which 18 direction that could influence the results, 19 correct? 20 <b>A I think it could have an impact. I don't</b> 21 <b>know the direction of the impact. And that's why</b> 22 <b>I searched in some cases by clearing the cache and</b> 23 <b>in other cases by -- at least one case by not.</b> 24 MR. GETZOFF: Off the record. 25 (Break taken from 1:37 p.m. to 2:45 p.m.)</p>	<p>115</p> <p>1 Q Do you know whether that search was one 2 that you ran incognito mode or private mode? 3 <b>A Typically a search that I would paste into</b> 4 <b>a report would be run in incognito mode. But I</b> 5 <b>don't specifically recall whether that was the</b> 6 <b>case here. That's my normal course of action.</b> 7 Q Dr. Anderson, I want to switch gears a 8 little bit and ask you some questions about your 9 criticism of Mr. Poret's questioning. And in 10 particular you accuse him of using leading 11 questions in some of his questions. 12 I believe that section of the report 13 starts on page 33 -- or pardon me, 32, 14 paragraph 93. Are you with me? 15 <b>A Section IV in my report, the Poret survey</b> 16 <b>asks questions that are leading and vague?</b> 17 Q Correct. 18 <b>A I'm there.</b> 19 Q How do you define a leading question? For 20 purposes of the use of the word leading question 21 in your report, how do you define leading 22 question? 23 <b>A I think a leading question is one where</b> 24 <b>the question, or what the question is referring to</b> 25 <b>perhaps, suggests an answer to the question.</b></p>
<p>114</p> <p>1 Q (By Mr. Getzoff) Dr. Anderson, before we 2 broke for lunch I was asking you about the 3 conditions by which you ran the searches, the 4 Internet search engine searches, affected in your 5 report. And I think you said before we broke that 6 you cleared -- before running each search you 7 cleared your cache and search history before each 8 search except once that you intentionally left 9 it -- left it unclear. Is that right? 10 <b>A I believe I said at least one I left</b> 11 <b>intentionally uncleared. And I should clarify</b> 12 <b>that I also conducted some searches using what on</b> 13 <b>Google I think it's called incognito. So in that</b> 14 <b>sense it's not necessary to clear the cache. I</b> 15 <b>believe that mode prevents the cache or the search</b> 16 <b>history from affecting the next result.</b> 17 Q For the search reflected in figure 4 of 18 your report on page 15, the one where you pasted 19 the results into your report itself, did you clear 20 the cache and search history on that one? 21 <b>A I don't recall.</b> 22 Q Could that have been one where you 23 intentionally did not clear it? 24 <b>A I don't recall whether I did or not for</b> 25 <b>that one.</b></p>	<p>116</p> <p>1 Q Is one of your explanations or reasonings 2 for why you think Mr. Poret used leading 3 questions, you provide an explanation in 4 paragraph 105. Now I want to understand -- I want 5 to understand what you did here. How did you 6 calculate -- what did you do to calculate the 7 144 responses out of total 600? 8 <b>A I reviewed the database that was provided</b> 9 <b>with the Poret report, which I believe was</b> 10 <b>appendix D, as in Delta, to the Poret report. And</b> 11 <b>on a respondent-by-respondent basis, so for each</b> 12 <b>respondent I classified that respondent as to</b> 13 <b>whether they did or did not indicate that one or</b> 14 <b>more of the search results on the page that</b> 15 <b>Mr. Poret tested were -- that were not for Elevate</b> 16 <b>nor for the defendant, was whether the respondent</b> 17 <b>indicated that it was for or affiliated with --</b> 18 <b>with Elevate.</b> 19 Q So to conclude that 144 respondents 20 indicated one of the other search results, which 21 is to say not Elevations or Elevate, did you add 22 all the respondents together who searched 23 anything -- who put anything other than Elevate or 24 Elevations to arrive at the 144? 25 <b>A I think that's the right way to say it,</b></p>

Conducted on July 27, 2021

<p>117</p> <p>1 yes. So as I mentioned I classified each 2 respondent regardless of how many of those, what 3 I've called, other search results. Regardless of 4 how many of those other search results they 5 selected, each respondent was given -- was 6 classified that they -- that they did or did not 7 select at least one of those search results. So 8 if a respondent selected multiple other search 9 results, they were only counted once.</p> <p>10 Q Correct. But you aggregated for everybody 11 that selected a result other than Elevate or 12 Elevations, you aggregated all of them together to 13 arrive at the 144, right?</p> <p>14 A That's correct.</p> <p>15 Q And you said that there was 600 total 16 respondents. But there were only 300 total 17 respondents in Mr. Poret's report. How did you 18 get to 600?</p> <p>19 A If there were only 300, then I apologize. 20 That 600 must be a mistake. And in that case that 21 would make -- 144 would be a higher percentage. 22 Probably it looks like 48 percent out of 300.</p> <p>23 Q So you think the 144 is accurate but the 24 600 is double?</p> <p>25 MS. ALLEN: I'm just going to object that</p>	<p>119</p> <p>1 Q And then so if -- if the 600 should have 2 been 300, I'm going back to your report now, is 3 144 correct or is 24 percent correct? And what --</p> <p>4 A I believe the 144 was correct because I 5 did a count of those respondents who met the 6 criteria that I mentioned for selecting one of the 7 other search results.</p> <p>8 THE REPORTER: Excuse me, Doctor, can I 9 just make sure -- can you just be sure and speak 10 up a little bit more, please?</p> <p>11 THE WITNESS: Yes. Did you hear the last 12 response?</p> <p>13 THE REPORTER: Yes. I'm straining but I 14 heard it, yes. Thank you.</p> <p>15 Q (By Mr. Getzoff) I want to see -- Doctor, 16 I want to see if we can get to the bottom of this. 17 I'm going to send you Exhibit D as in dog -- I'm 18 sorry, appendix D of his report, which it looks 19 like that's what you used to do this calculation. 20 Is that right?</p> <p>21 A Exhibit D, correct.</p> <p>22 Q Okay.</p> <p>23 A I'm sorry, appendix D.</p> <p>24 Q Appendix D. So appendix D was separately 25 marked in Mr. Poret's deposition as Exhibit 67.</p>
<p>118</p> <p>1 it misstates the testimony.</p> <p>2 A Well, actually no. The report is correct. 3 There were 300 respondents in the test and 300 in 4 the control according to my footnote here. So I'd 5 have to look back at Mr. Poret's report to find 6 out the number of respondents in his survey.</p> <p>7 Q (By Mr. Getzoff) So if you look at his 8 report. Here, let me --</p> <p>9 (Exhibit No. 62 was previously marked for 10 identification and is attached to the transcript.)</p> <p>11 Q So, Dr. Anderson, I have put what's been 12 previously marked as Exhibit 62, Deposition 13 Exhibit 62, in the chat room, which is the body of 14 his report. And if you turn -- if you look at 15 page 9 where he starts talking about the -- the 16 design. He says there was a total of 300 17 respondents.</p> <p>18 A At the bottom of page 9 you said?</p> <p>19 Q It's actually -- it's the top of page 9.</p> <p>20 A I see that.</p> <p>21 Q So you think the 600 you meant 300?</p> <p>22 A This is something we could, you know, 23 easily verify by looking at his data file. But, 24 yes, it looks like I made a mistake in the total 25 number of respondents in the Poret survey.</p>	<p>120</p> <p>1 (Exhibit No. 67 was previously marked for 2 identification and is attached to the transcript.)</p> <p>3 Q I have put Exhibit 67 in the chat. And 4 just as a warning it initially is the entire 5 spreadsheet on a single page. At least that's the 6 way it appears to me until you start to blow it 7 up.</p> <p>8 A I didn't understand what you just said.</p> <p>9 Q It's probably not material. It's an Excel 10 spreadsheet. And the way it was saved makes it 11 look really, really small when you first open it. 12 That's all I meant. Okay.</p> <p>13 A I've got Exhibit 67 open.</p> <p>14 Q Okay. So could you -- looking at the 15 process you followed as described by you in 16 paragraph 105, can you walk me through what you 17 actually did on Exhibit 67 to arrive at the 144?</p> <p>18 A Do you have the data map available that 19 was provided that explains what these codes mean?</p> <p>20 Q Yes. Give me a second. So what does -- 21 so what does a data map look like? Is it another 22 Excel spreadsheet?</p> <p>23 A I forget the format that Mr. Poret 24 provided it in. It wasn't included with his 25 initial report, which is why I think it had to be</p>

Conducted on July 27, 2021

<p>121</p> <p>1 requested.</p> <p>2 Q I think -- I think I have it. I just --</p> <p>3 A What it would provide is, for example,</p> <p>4 does a one mean a yes or no, for instance. Or</p> <p>5 does a one mean a male or female. It would</p> <p>6 provide that kind of interpretation of what we see</p> <p>7 in Exhibit D -- appendix D.</p> <p>8 Q Okay. I'm going to put that in the chat</p> <p>9 room, and we will mark this as the next exhibit.</p> <p>10 MR. GETZOFF: Which will make it 78 I</p> <p>11 think, Carla?</p> <p>12 THE REPORTER: (Nodding head.)</p> <p>13 (Exhibit No. 78 was marked for</p> <p>14 identification and is attached to the transcript.)</p> <p>15 Q (By Mr. Getzoff) So what I -- what I just</p> <p>16 sent you, Dr. Anderson, is it's an Excel</p> <p>17 spreadsheet. It has two sheets at the bottom.</p> <p>18 The first sheet I think is the same as Exhibit 67</p> <p>19 that I sent you. And then it has a different it</p> <p>20 has a different -- it has a second sheet, which is</p> <p>21 the data map that I think interprets the answers.</p> <p>22 A I see those.</p> <p>23 Q And I don't necessarily need you to</p> <p>24 recompute everything. I just want you to explain</p> <p>25 sort of the methodology you went through to add</p>	<p>123</p> <p>1 for questions 330 and questions 350, the control</p> <p>2 cell. If at -- in any of those columns the</p> <p>3 respondent indicated that they -- data indicates</p> <p>4 that the respondent selected area 1, 8, 9, 10,</p> <p>5 and/or 11, then I would have counted them as</p> <p>6 having selected one of those other search results.</p> <p>7 Q I see. So for example, for the first</p> <p>8 entry here case ID 10011, if you go over to the</p> <p>9 Q330 questions they responded for AH, they put in</p> <p>10 a number 1.</p> <p>11 A Well, that was -- that was a different</p> <p>12 question. That was question 320.</p> <p>13 Q Ah.</p> <p>14 A But I would start looking --</p> <p>15 Q Sorry, right so --</p> <p>16 (Simultaneous crosstalk.)</p> <p>17 Q (By Mr. Getzoff) So it's column -- you</p> <p>18 talk. I'll listen.</p> <p>19 A So for that respondent and the way this</p> <p>20 data file is organized it makes it a little</p> <p>21 inconvenient as opposed to having a column for</p> <p>22 each response option. But in A, column AI, that</p> <p>23 respondent indicated area two on the searchable --</p> <p>24 the applicable image that Mr. Poret showed. And</p> <p>25 then in the next column area 4 and area 5, 7, and</p>
<p>122</p> <p>1 this up.</p> <p>2 A And I know there was also a document that</p> <p>3 explained what the different areas, applicable</p> <p>4 areas, were on the search results that Mr. Poret</p> <p>5 tested. I'm not going to ask you to provide that</p> <p>6 also, but I'm going to refer to my footnote 85.</p> <p>7 And based that it looks like the areas</p> <p>8 numbered 1, 8, 9, 10, and 11 are search results in</p> <p>9 what Mr. Poret tested that do not refer to Elevate</p> <p>10 or Elevations. So what I did in my analysis is</p> <p>11 for each respondent and in the Excel file in row 2</p> <p>12 there's respondent that's labeled in column case</p> <p>13 ID. In cell 2 -- what's cell A2 case ID 10011.</p> <p>14 It's one of the respondents in the survey. I</p> <p>15 would have gone to their responses for the</p> <p>16 questions that measure likelihood of confusion,</p> <p>17 which I believe start at question 3 -- I don't</p> <p>18 know if it's 320. Let's see. 320. No, 330.</p> <p>19 Q330. And in columns AH through AT are the</p> <p>20 responses for one of the questions Mr. Poret asked</p> <p>21 that measured -- that he used to measure</p> <p>22 likelihood of confusion.</p> <p>23 And then for question 350, 3-5-0, in</p> <p>24 columns AV through BG, that's I believe for the</p> <p>25 test cell. And then also there are other columns</p>	<p>124</p> <p>1 12 and if we continue to question 350 they -- that</p> <p>2 respondent selected area 3.</p> <p>3 And I think from the list I just</p> <p>4 mentioned, none of those areas indicate an other</p> <p>5 response. So I would have classified that</p> <p>6 response as not having selected any of the other</p> <p>7 search results. And I'll give an example of--</p> <p>8 the fourth respondent down, this is case ID</p> <p>9 100319, that respondent in column AK did select</p> <p>10 the eighth search result or the eighth area that</p> <p>11 was selectable on the map. And it looks like that</p> <p>12 was one of the other search results. So they</p> <p>13 would have been classified as having selected one</p> <p>14 of the other search results other than Elevate or</p> <p>15 the defendant.</p> <p>16 Q Got it. So you didn't distinguish between</p> <p>17 what other category they selected. So long as it</p> <p>18 was one of the other categories, they were</p> <p>19 included in your total.</p> <p>20 A One of the other search results, right.</p> <p>21 Q So basically if it wasn't -- if it was a</p> <p>22 1, 8, 9, 10, or 11 you aggregated all of those</p> <p>23 responses to arrive at 144, the figure you put in</p> <p>24 paragraph 105.</p> <p>25 A No, not all the responses. All of the</p>

Conducted on July 27, 2021


<p>125</p> <p>1 <b>respondents, so.</b></p> <p>2 Q I stand corrected.</p> <p>3 <b>A And each with -- each respondent --</b></p> <p>4 Q You didn't double count -- you didn't</p> <p>5 count a respondent twice. If a respondent</p> <p>6 selected 1, 8, 9, 10, or 11 or any of the</p> <p>7 questions in cell 330 or 350, they went in the</p> <p>8 other category for your calculation and were part</p> <p>9 of the total that led to the 144 figure.</p> <p>10 <b>A There was no double counting of</b></p> <p>11 <b>respondents, that's correct.</b></p> <p>12 Q Okay. I think we can figure out the rest.</p> <p>13 Dr. Anderson, over the last 18 months,</p> <p>14 basically during -- during the time of the COVID</p> <p>15 pandemic, do you think consumer buying of banking</p> <p>16 or credit union services over the Internet have</p> <p>17 gone up or down?</p> <p>18 MS. ALLEN: I'm going to object that it's</p> <p>19 outside of the scope of his report.</p> <p>20 <b>A I don't know the answer to that.</b></p> <p>21 Q (By Mr. Getzoff) Have you looked at</p> <p>22 any -- any data or objective information indicate</p> <p>23 whether consumers of banking or financial services</p> <p>24 the during COVID over the Internet has gone up or</p> <p>25 down?</p>	<p>127</p> <p>1 <b>is correct.</b></p> <p>2 Q (By Mr. Getzoff) Well, the premise of the</p> <p>3 question was an if. So that's asking you to</p> <p>4 accept the premise. If -- if the physical</p> <p>5 locations during the COVID pandemic, the physical</p> <p>6 Elevate Federal Credit Union locations have been</p> <p>7 closed, how do you think their customers have --</p> <p>8 how do you think they have obtained new customers?</p> <p>9 MS. ALLEN: Same objections.</p> <p>10 <b>A Sorry, I'm not sure the premise is</b></p> <p>11 <b>correct. And I think that question was different</b></p> <p>12 <b>than the previous one you asked me, so I have to</b></p> <p>13 <b>ask you to repeat it.</b></p> <p>14 Q (By Mr. Getzoff) What part of the -- what</p> <p>15 part of the premise are you disagreeing with?</p> <p>16 <b>A Well, I think the first time you asked me</b></p> <p>17 <b>the question you phrased it as if -- if credit</b></p> <p>18 <b>unions have been closed.</b></p> <p>19 Q No. No.</p> <p>20 (Simultaneous crosstalk.)</p> <p>21 Q (By Mr. Getzoff) If the physical branch</p> <p>22 locations that people would normally go into if</p> <p>23 they wanted to conduct their banking in person, if</p> <p>24 those locations have been closed during the COVID</p> <p>25 pandemic how do you think Elevate Federal Credit</p>
<p>126</p> <p>1 MS. ALLEN: Vague.</p> <p>2 <b>A Not that I recall.</b></p> <p>3 Q (By Mr. Getzoff) Do you know, again over</p> <p>4 the last 18 months or so during the COVID</p> <p>5 pandemic, whether physical branches for Elevate</p> <p>6 Federal Credit Union have been open for people to</p> <p>7 walk into?</p> <p>8 <b>A I didn't hear all of your question.</b></p> <p>9 Q Do you know whether during the last</p> <p>10 18 months or so of the COVID pandemic whether the</p> <p>11 physical brick and mortar bank branches operated</p> <p>12 by Elevate Federal Credit Union have been open?</p> <p>13 MS. ALLEN: Objection that it's outside of</p> <p>14 the scope of his report.</p> <p>15 <b>A No.</b></p> <p>16 Q (By Mr. Getzoff) You don't know one way</p> <p>17 or the other?</p> <p>18 <b>A That's correct. I don't know.</b></p> <p>19 Q If -- if credit union branch locations</p> <p>20 have been closed over the last 18 months, how do</p> <p>21 you think people have signed up for banking</p> <p>22 services or credit union services?</p> <p>23 MS. ALLEN: Calls for speculation,</p> <p>24 incomplete hypothetical.</p> <p>25 <b>A I don't think the premise of the question</b></p>	<p>128</p> <p>1 Union has been signing up new customers?</p> <p>2 MS. ALLEN: Same objections.</p> <p>3 <b>A Again, this is still a different question.</b></p> <p>4 <b>In the premise, are you talking about Elevate?</b></p> <p>5 Q (By Mr. Getzoff) Yes.</p> <p>6 <b>A Not credit unions in general, which is --</b></p> <p>7 Q I'm talking about Elevate. I'm asking you</p> <p>8 to assume that the Elevate branch locations have</p> <p>9 been closed to foot traffic during COVID. And if</p> <p>10 that's been the case how has Elevations been</p> <p>11 signing up new customers?</p> <p>12 MS. ALLEN: Same objections.</p> <p>13 <b>A Once again, I don't know that the premise</b></p> <p>14 <b>of the question is true. But regardless, the</b></p> <p>15 <b>answer would be I don't know.</b></p> <p>16 Q (By Mr. Getzoff) I mean all of your</p> <p>17 experience in consumer behavior including the</p> <p>18 financial institutions and if they can't sign up</p> <p>19 in person you have no idea how they might sign up</p> <p>20 as an alternative to an in-person transaction?</p> <p>21 MS. ALLEN: Misstates the testimony, asked</p> <p>22 and answered.</p> <p>23 <b>A I think I would have to speculate, which I</b></p> <p>24 <b>don't think the court would want me to do.</b></p> <p>25 Q (By Mr. Getzoff) That sounds -- fair to</p>



Conducted on July 27, 2021

<p>129</p> <p>1 say, that's outside the field of your expertise?</p> <p>2 MS. ALLEN: Misstates the testimony.</p> <p>3 <b>A I wouldn't say it's outside of the field</b></p> <p>4 <b>of my expertise. But I think you're asking a</b></p> <p>5 <b>question for which information probably exists,</b></p> <p>6 <b>but it's not at my disposal.</b></p> <p>7 Q (By Mr. Getzoff) Well, in your report you</p> <p>8 said that consumers are not likely to select a</p> <p>9 credit union based solely on a list of Internet</p> <p>10 search results, right?</p> <p>11 <b>A You're reading the last sentence of</b></p> <p>12 <b>paragraph 77, correct?</b></p> <p>13 Q Correct.</p> <p>14 <b>A Yes, I did say that -- or write that.</b></p> <p>15 Q What did you rely on to reach that</p> <p>16 conclusion -- strike that. Let me ask a different</p> <p>17 question.</p> <p>18 You weren't speculating when you made that</p> <p>19 assertion, right?</p> <p>20 <b>A No. I was -- this is part of my report</b></p> <p>21 <b>where I discuss involvement beginning in</b></p> <p>22 <b>paragraph 69 and the effect that involvement has</b></p> <p>23 <b>on decision-making. And I've also cited some of</b></p> <p>24 <b>the information from Mr. Poret's survey and then</b></p> <p>25 <b>reached that paragraph 77 where I made that</b></p>	<p>131</p> <p>1 in reverse. Are you aware of how many of</p> <p>2 Elevations' current customers are eligible to join</p> <p>3 Elevate Federal Credit Union?</p> <p>4 MS. ALLEN: Same objection.</p> <p>5 <b>A No.</b></p> <p>6 MR. GETZOFF: Let's go off the record.</p> <p>7 (Break taken from 3:20 p.m. to 3:29 p.m.)</p> <p>8 Q (By Mr. Getzoff) Dr. Anderson, during the</p> <p>9 lunch break today or at any time did you happen to</p> <p>10 run a search of (indiscernible.)</p> <p>11 THE REPORTER: I'm sorry, of what?</p> <p>12 Q (By Mr. Getzoff) Elevate Credit Union to</p> <p>13 see what the results were?</p> <p>14 <b>A No.</b></p> <p>15 Q Are you -- are you curious?</p> <p>16 <b>A I may be curious by nature but in regard</b></p> <p>17 <b>to that question, no, I don't think that it would</b></p> <p>18 <b>matter today.</b></p> <p>19 Q You said you don't think it matters?</p> <p>20 <b>A I don't it matters what that search</b></p> <p>21 <b>result -- what the search results would be today.</b></p> <p>22 Q And why is that?</p> <p>23 <b>A Mr. Poret was responsible -- Mr. Poret was</b></p> <p>24 <b>responsible for conducting searches when he</b></p> <p>25 <b>designed his survey to demonstrate justification</b></p>
<p>130</p> <p>1 <b>statement.</b></p> <p>2 Q Have you looked at or relied on any data</p> <p>3 or objective information to know how many -- or</p> <p>4 how often credit union customers in general</p> <p>5 actually use a branch location, a physical branch</p> <p>6 location?</p> <p>7 <b>A No.</b></p> <p>8 Q Have you looked at any data or objective</p> <p>9 information to determine how many credit union</p> <p>10 customers conduct most or all of their -- their</p> <p>11 banking online?</p> <p>12 MS. ALLEN: Vague.</p> <p>13 <b>A No, I don't believe so.</b></p> <p>14 Q (By Mr. Getzoff) Are you aware of banks</p> <p>15 or credit unions that have no physical branches at</p> <p>16 all that are 100 percent online?</p> <p>17 <b>A I believe that to be the case at least for</b></p> <p>18 <b>banks. I don't know about credit unions.</b></p> <p>19 Q Are you aware of how many of Elevate's</p> <p>20 current customers are eligible to join Elevations</p> <p>21 Credit Union?</p> <p>22 MS. ALLEN: Objection, outside the scope</p> <p>23 of his report.</p> <p>24 <b>A No.</b></p> <p>25 Q (By Mr. Getzoff) And that same question</p>	<p>132</p> <p>1 <b>for the type of survey that he conducted.</b></p> <p>2 Q So if there's physical proximity -- if</p> <p>3 there's proximity in search results between</p> <p>4 Elevations and Elevate, such as on the same first</p> <p>5 page of a search for Elevate Credit Union, you</p> <p>6 don't think it matters?</p> <p>7 MS. ALLEN: Objection, misstates the</p> <p>8 testimony, calls for speculation.</p> <p>9 <b>A I think your question was referring to</b></p> <p>10 <b>what the results would be (indiscernible.)</b></p> <p>11 THE REPORTER: I'm sorry. Can you start</p> <p>12 that over? You're really bleeping out.</p> <p>13 THE WITNESS: Can you hear me okay?</p> <p>14 THE REPORTER: Yes.</p> <p>15 THE WITNESS: Is that better?</p> <p>16 THE REPORTER: Yes.</p> <p>17 <b>A I believe your question referred to search</b></p> <p>18 <b>results today. And search results today may not</b></p> <p>19 <b>reflect the situation when Mr. Poret conducted his</b></p> <p>20 <b>survey or the searches that he may have conducted</b></p> <p>21 <b>he didn't document. So I don't know that search</b></p> <p>22 <b>results today would be relevant to evaluating the</b></p> <p>23 <b>Poret survey.</b></p> <p>24 Q (By Mr. Getzoff) Dr. Anderson, is it your</p> <p>25 understanding that the plaintiff Elevate is still</p>

Conducted on July 27, 2021

<p>133</p> <p>1 today using the mark Elevate for all of their 2 services? 3 MS. ALLEN: Objection, outside the scope 4 of his report. 5 <b>A I don't know.</b> 6 Q (By Mr. Getzoff) If the -- if the 7 circumstances and conditions of the use of the 8 marks by both parties is the same today as it was 9 three months ago, wouldn't you want to know 10 whether there was competitive proximity from the 11 consumer standpoint as to those marks? 12 MS. ALLEN: Objection, calls for 13 speculation and vague. 14 <b>A Not in terms of my opinions. It wouldn't 15 affect my opinion about the Poret survey, which 16 was provided in the first quarter -- conducted in 17 the first quarter of this year.</b> 18 Q (By Mr. Getzoff) But it would be relevant 19 to the real world situation as to whether there's 20 a likelihood of confusion between these two marks 21 based on ongoing use by the two parties, right? 22 <b>A I don't know whether it would be relevant 23 to that issue. But it would not be relevant to my 24 opinions about the Poret survey, and it wouldn't 25 be relevant to the Poret survey.</b></p>	<p>135</p> <p>1 ACKNOWLEDGMENT OF DEPONENT 2 I, JUSTIN ANDERSON, PhD, do hereby 3 acknowledge that I have read and examined the 4 foregoing testimony and the same is a true, 5 correct, and complete transcription of the 6 testimony given by me and any corrections appear 7 on the attached errata sheet signed by me. 8 9 10 11 _____ 12 (SIGNATURE) (DATE) 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>134</p> <p>1 MR. GETZOFF: I have no further questions. 2 Thank you, sir, for your time. 3 THE WITNESS: Thank you. 4 THE REPORTER: And if there's not any 5 other questions, can I get you-all to state on the 6 record what you'd like to order, please. 7 MR. GETZOFF: I would like an e-trans, 8 please. 9 MS. ALLEN: We'll have the same. 10 (The adjourned concluded at 3:33 p.m.) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>136</p> <p>1 CERTIFICATE OF SHORTHAND REPORTER 2 3 I, CARLA S. KIMBROUGH, court reporter, the officer 4 before whom the foregoing deposition was taken, do 5 hereby certify that the foregoing transcript is a 6 true and correct record of the testimony given; 7 that said testimony was taken by me 8 stenographically and thereafter reduced to 9 typewriting under my direction; and that I am 10 neither counsel for, related to, nor employed by 11 any of the parties to this case and have no 12 interest, financial or otherwise, in its outcome. 13 14 IN WITNESS WHEREOF, I have hereunto set my hand 15 and affixed my seal this 9th day of August, 2021. 16 17  18 19 Carla Sue Kimbrough, C.S.R. 20 Oklahoma Certified Shorthand Reporter 21 Certificate No. 1237 22 23 24 25</p>



A			
<b>a-n-d-e-r-s-o-n</b>	128:4, 128:7, 130:18, 133:15, 133:24	120:17, 130:5	<b>affiliated</b>
6:2		<b>add</b>	116:17
<b>a2</b>	<b>abstract</b>	116:21, 121:25	<b>affixed</b>
122:13	58:8	<b>adding</b>	136:15
<b>able</b>	<b>accept</b>	106:24	<b>after</b>
9:16, 9:23, 59:19	32:3, 46:22, 99:2, 127:4	<b>addition</b>	25:24, 91:9, 93:2, 94:8, 96:3
<b>about</b>	<b>accepted</b>	<b>additional</b>	<b>again</b>
7:4, 11:4, 24:4, 24:13, 25:17, 27:19, 28:2, 28:4, 32:22, 33:1, 35:23, 41:5, 42:3, 42:23, 43:17, 47:4, 50:14, 52:24, 53:25, 54:4, 54:9, 54:13, 54:16, 55:5, 58:18, 59:19, 61:16, 61:17, 61:19, 61:20, 62:2, 67:12, 67:14, 69:7, 72:17, 73:12, 76:10, 77:5, 77:7, 77:9, 77:12, 77:16, 77:18, 77:19, 77:21, 78:3, 78:24, 81:17, 81:20, 84:25, 85:9, 85:14, 85:18, 87:10, 88:23, 90:20, 91:3, 92:11, 93:10, 94:2, 94:17, 94:23, 95:1, 95:22, 96:7, 96:17, 96:18, 100:12, 101:11, 108:10, 108:22, 111:25, 113:1, 114:2, 115:8, 118:15,	31:13 <b>according</b> 29:17, 61:11, 79:19, 104:7, 110:3, 110:25, 118:4 <b>account</b> 113:7 <b>accurate</b> 8:14, 8:24, 11:15, 21:5, 102:25, 117:23 <b>accuse</b> 115:10 <b>accused</b> 12:5, 12:9, 13:6, 14:11, 37:2 <b>accusing</b> 12:12 <b>acknowledge</b> 5:5, 5:14, 5:18, 102:1, 135:3 <b>acknowledgment</b> 135:1 <b>across</b> 30:21, 30:25, 86:20 <b>action</b> 1:6, 115:6 <b>actionable</b> 31:21 <b>actual</b> 52:22 <b>actually</b> 32:17, 50:15, 82:6, 91:13, 118:2, 118:19,	<b>address</b> 6:9, 7:25, 61:19, 63:21, 68:12 <b>addressed</b> 19:8, 31:17, 76:9 <b>addresses</b> 53:3, 53:7, 68:15 <b>adjourned</b> 134:10 <b>admissibility</b> 5:7 <b>admitted</b> 91:14 <b>advertisement</b> 47:8, 48:1, 99:4 <b>advertisements</b> 47:23 <b>advertises</b> 48:1, 48:8 <b>advertising</b> 48:20, 49:1, 104:25, 105:9, 105:10, 105:14, 105:18, 105:22, 105:24, 106:2, 106:6 <b>affect</b> 67:1, 72:21, 133:15 <b>affected</b> 101:7, 108:12, 108:20, 114:4 <b>affecting</b> 108:16, 114:16 <b>affects</b> 70:4, 76:3	<b>against</b> 80:22, 91:3, 92:7, 92:11, 93:6, 95:4 <b>aggregated</b> 117:10, 117:12, 124:22 <b>ago</b> 22:20, 22:22, 28:5, 40:9, 40:10, 133:9 <b>agree</b> 5:11, 5:12, 8:7, 38:11, 47:19, 47:25, 52:22, 71:20, 105:3, 105:5, 106:10, 111:3 <b>agreed</b> 55:17 <b>agreement</b> 95:3 <b>ah</b> 122:19, 123:9, 123:13 <b>ai</b> 123:22 <b>ak</b> 124:9 <b>al</b> 19:16 <b>algorithm</b> 108:17

<b>algorithms</b> 89:5 <b>aligned</b> 37:1 <b>all</b> 5:17, 9:5, 9:6, 11:17, 12:23, 21:5, 21:12, 27:25, 42:17, 43:1, 43:11, 43:18, 49:21, 57:2, 80:3, 82:11, 83:18, 86:6, 90:15, 93:9, 94:9, 95:7, 99:15, 101:2, 102:5, 102:8, 108:23, 111:25, 116:22, 117:12, 120:12, 124:22, 124:25, 126:8, 128:16, 130:10, 130:16, 133:1 <b>allegations</b> 32:8, 39:23 <b>alleged</b> 13:13, 14:21, 15:21, 80:21 <b>allergen</b> 17:10 <b>allow</b> 44:12, 90:3, 91:2, 94:2 <b>allowing</b> 90:22 <b>already</b> 42:9, 64:2, 91:13, 93:3 <b>also</b> 3:18, 6:21, 13:4, 15:4, 20:16, 26:5, 43:1, 72:3, 83:15, 110:19, 114:12, 122:2, 122:6, 122:25, 129:23	<b>alternative</b> 128:20 <b>although</b> 83:15 <b>always</b> 12:2, 12:3, 12:4 <b>ambiguous</b> 43:4 <b>among</b> 54:1, 54:24 <b>analysis</b> 26:6, 57:17, 105:14, 109:25, 122:10 <b>analyzed</b> 105:22 <b>anderson</b> 1:18, 2:1, 4:3, 4:8, 5:10, 5:13, 6:2, 6:3, 6:4, 6:6, 6:8, 6:16, 7:8, 7:24, 8:11, 8:20, 9:12, 10:7, 10:10, 10:13, 21:4, 22:3, 23:6, 24:3, 27:4, 28:18, 34:20, 36:2, 36:12, 41:18, 42:15, 43:16, 43:21, 44:3, 51:17, 52:15, 58:5, 78:20, 93:13, 94:4, 96:1, 96:22, 97:8, 97:20, 97:24, 100:17, 110:8, 114:1, 115:7, 118:11, 121:16, 125:13, 131:8, 132:24, 135:2 <b>another</b> 40:14, 41:1, 59:13, 59:23, 78:15, 97:15, 108:24, 120:21	<b>answer</b> 8:18, 18:2, 20:1, 32:1, 32:7, 33:7, 33:14, 35:15, 42:21, 43:17, 47:16, 61:1, 71:25, 84:11, 88:7, 94:25, 95:12, 95:19, 95:22, 96:6, 96:20, 115:25, 125:20, 128:15 <b>answered</b> 24:20, 26:15, 27:1, 27:22, 28:9, 28:12, 35:18, 36:16, 40:17, 40:23, 41:3, 41:10, 41:22, 42:13, 43:15, 45:18, 48:23, 49:15, 51:8, 61:23, 69:2, 74:2, 75:17, 84:5, 84:14, 85:4, 88:16, 106:25, 128:22 <b>answers</b> 109:11, 121:21 <b>any</b> 8:7, 8:8, 21:8, 21:16, 21:20, 23:4, 24:23, 25:4, 25:10, 26:6, 26:18, 29:19, 30:23, 32:4, 42:23, 45:25, 46:9, 46:18, 49:10, 49:11, 50:9, 50:22, 51:5, 59:21, 62:4, 62:14, 64:18, 65:12, 65:25, 67:8, 67:17, 67:23, 67:25, 68:24, 69:10, 70:1, 70:14, 72:8, 72:23, 73:4, 73:7, 73:23, 74:8, 74:22, 75:4, 76:5, 84:8, 85:1, 86:13, 86:15, 88:11, 88:19, 89:12, 90:15, 91:11, 94:5, 97:5, 105:13, 105:17, 105:25, 109:12, 110:5, 110:15, 111:15, 112:14, 123:2, 124:6, 125:6, 125:22, 130:2, 130:8, 131:9, 134:4, 135:6, 136:11 <b>anybody</b> 24:7, 24:17, 25:14, 25:21 <b>anymore</b> 110:1 <b>anyone</b> 8:3, 24:11, 25:8, 25:17, 28:24 <b>anything</b> 27:19, 30:14, 30:21, 30:25, 39:25, 51:14, 64:9, 70:7, 91:5, 116:23 <b>anywhere</b> 85:17 <b>apologize</b> 6:7, 117:19 <b>app</b> 79:25, 85:13 <b>appear</b> 135:6 <b>appearance</b> 13:14 <b>appeared</b> 86:7
--	---	--

<b>appearing</b> 108:15 <b>appears</b> 98:19, 100:11, 120:6 <b>appendix</b> 116:10, 119:18, 119:23, 119:24, 121:7 <b>appendixes</b> 10:18 <b>applicable</b> 122:3, 123:24 <b>applicant</b> 15:24 <b>applicant's</b> 16:2 <b>applied</b> 50:6, 50:10 <b>applying</b> 49:11 <b>appropriate</b> 38:13, 44:19, 45:4, 45:16, 45:22, 52:21, 57:5, 57:17, 58:2, 89:16, 92:1, 92:14, 102:3, 103:11, 104:5, 105:7, 107:10, 108:18 <b>appropriately</b> 92:15 <b>approximately</b> 6:22 <b>area</b> 123:4, 123:23, 123:25, 124:2, 124:10 <b>areas</b> 122:3, 122:4, 122:7, 124:4 <b>aren't</b> 42:24, 51:15, 90:25, 102:4, 107:23 <b>argued</b> 39:11	<b>arguments</b> 43:6, 43:19, 89:23, 109:12 <b>around</b> 47:21 <b>arrive</b> 82:24, 116:24, 117:13, 120:17, 124:23 <b>arrow</b> 112:20, 112:21 <b>article</b> 51:18, 51:24, 52:13, 52:19, 53:1, 53:5, 53:14, 53:15, 53:21, 54:18, 56:15, 57:1, 62:3, 100:12, 100:18, 101:17, 103:4, 104:8, 106:21, 108:9, 108:13, 111:2, 111:4, 111:21 <b>articles</b> 108:13, 111:1 <b>aside</b> 11:14, 106:18 <b>asked</b> 18:2, 24:20, 26:10, 26:15, 27:1, 27:9, 27:22, 28:9, 28:12, 35:18, 36:16, 40:17, 40:23, 41:3, 41:22, 42:13, 42:22, 43:8, 43:10, 43:14, 45:18, 48:23, 49:15, 51:8, 52:23, 59:16, 61:23, 69:2, 74:2, 75:17, 77:7, 84:5, 85:4, 88:15, 96:15, 108:22, 122:20, 127:12,	127:16, 128:21 <b>asking</b> 23:22, 35:1, 35:2, 35:3, 41:5, 42:3, 42:10, 43:9, 43:10, 47:15, 61:16, 61:17, 61:18, 77:5, 77:8, 77:16, 77:18, 77:19, 81:17, 89:14, 94:12, 94:20, 106:17, 106:19, 114:2, 127:3, 128:7, 129:4 <b>asks</b> 115:16 <b>assert</b> 69:20 <b>asserted</b> 38:19 <b>asserting</b> 15:21, 15:23 <b>assertion</b> 60:6, 60:9, 62:14, 70:2, 72:9, 72:15, 72:16, 129:19 <b>assertions</b> 70:22, 70:23 <b>assist</b> 26:5 <b>assume</b> 15:10, 97:3, 106:19, 128:8 <b>assumed</b> 12:24 <b>assuming</b> 109:3 <b>atlantic</b> 19:16 <b>attached</b> 4:7, 10:6, 52:11, 91:18, 96:25, 118:10, 120:2, 121:14, 135:7	<b>attempt</b> 113:9 <b>attempting</b> 19:24 <b>attend</b> 71:12 <b>attention</b> 55:15 <b>attorneys</b> 25:12 <b>audioeye</b> 15:9, 15:12, 15:24 <b>august</b> 136:15 <b>authoritative</b> 53:2, 53:6, 111:4 <b>authorities</b> 111:1 <b>authority</b> 52:20, 52:24 <b>authors</b> 55:18, 55:23, 56:7, 56:25, 57:21, 100:18, 105:6 <b>automatically</b> 48:10, 48:21 <b>av</b> 122:24 <b>available</b> 60:13, 60:19, 120:18 <b>aware</b> 32:4, 48:15, 48:18, 64:2, 102:12, 102:13, 130:14, 130:19, 131:1 <b>awareness</b> 37:22, 38:7, 38:14, 39:1, 39:7, 39:20, 40:4, 45:2, 45:11, 45:21, 46:4, 46:8, 46:10, 46:12,
--	---	---	--

47:5, 47:9, 47:14, 48:3, 48:11, 48:22, 48:25, 49:1, 49:8, 49:13, 50:2, 50:13, 50:16, 50:22, 50:24, 51:5, 102:7, 105:12, 110:24	35:21, 45:20, 47:16, 47:21, 55:19, 56:7, 56:22, 57:17, 61:10, 70:3, 72:20, 74:4, 74:6, 75:22, 76:2, 83:3, 108:3, 108:19, 112:19, 122:7, 129:9, 133:21	91:7, 104:21, 106:6, 106:17, 114:22, 118:11, 119:2, 124:13, 126:6, 126:12, 126:20, 127:6, 127:18, 127:24, 128:1, 128:9, 128:10 <b>before</b> 2:9, 20:16, 26:11, 34:2, 43:8, 69:11, 72:6, 73:1, 73:6, 73:25, 84:11, 84:15, 92:14, 92:15, 94:13, 94:21, 114:1, 114:5, 114:6, 114:7, 136:4 <b>beforehand</b> 113:2 <b>beginning</b> 129:21 <b>begins</b> 57:20, 70:16 <b>behalf</b> 3:2, 3:10 <b>behavior</b> 59:9, 59:17, 62:19, 68:9, 74:24, 75:5, 76:7, 78:2, 128:17 <b>being</b> 12:9, 13:6, 13:11, 14:11, 19:7, 29:1, 37:1, 38:18, 47:21, 52:19, 56:9, 57:12, 59:15, 59:16 <b>belief</b> 32:17 <b>believe</b> 7:13, 10:12, 11:13, 11:20,	12:11, 12:14, 12:16, 12:19, 13:8, 14:2, 14:13, 16:24, 17:24, 18:21, 23:24, 28:14, 30:2, 31:22, 36:6, 37:13, 42:23, 43:18, 45:8, 45:9, 46:23, 46:24, 47:2, 51:22, 51:23, 57:4, 57:19, 64:22, 67:22, 80:7, 81:25, 114:10, 114:15, 115:12, 116:9, 119:4, 122:17, 122:24, 130:13, 130:17, 132:17 <b>believed</b> 30:22 <b>besides</b> 30:14 <b>bet</b> 34:17 <b>better</b> 132:15 <b>between</b> 22:11, 54:10, 58:13, 58:19, 93:7, 124:16, 132:3, 133:20 <b>bg</b> 122:24 <b>bill</b> 29:14 <b>billed</b> 29:17 <b>bills</b> 29:10, 29:11 <b>bing</b> 60:7, 62:6, 82:5, 82:19, 85:12 <b>bit</b> 24:3, 115:8,
<b>B</b>			
<b>back</b> 17:1, 36:3, 78:21, 90:4, 90:7, 99:22, 100:2, 103:4, 118:5, 119:2 <b>backwards</b> 112:20 <b>bag</b> 11:10 <b>bags</b> 11:21, 12:12 <b>bank</b> 71:21, 72:1, 76:14, 76:19, 76:25, 77:5, 126:11 <b>banking</b> 24:12, 24:14, 24:18, 24:25, 25:6, 65:14, 65:17, 66:3, 67:10, 67:19, 68:1, 68:12, 73:22, 74:24, 75:6, 76:7, 77:12, 78:4, 78:8, 78:9, 125:15, 125:23, 126:21, 127:23, 130:11 <b>banks</b> 130:14, 130:18 <b>base</b> 108:19 <b>based</b> 5:8, 35:3,	<b>bases</b> 43:1, 43:6, 43:13 <b>basically</b> 90:4, 124:21, 125:14 <b>basis</b> 42:18, 62:14, 116:11 <b>bates</b> 96:16 <b>bay</b> 20:16, 20:23 <b>bearing</b> 46:8 <b>became</b> 48:17 <b>because</b> 31:18, 33:3, 33:5, 39:3, 48:7, 48:8, 64:13, 85:22, 93:6, 95:14, 102:22, 106:20, 107:14, 109:23, 119:4 <b>been</b> 8:12, 10:2, 11:24, 24:1, 26:11, 26:24, 26:25, 27:6, 29:19, 45:16, 46:19, 49:4, 49:5, 49:11, 50:25, 73:16, 74:22, 75:3, 76:10, 90:9,		

119:10 <b>blackboard</b> 15:9, 15:18, 15:20, 15:21, 15:25 <b>blackstone</b> 12:17 <b>bleeping</b> 132:12 <b>blow</b> 120:6 <b>blueprint</b> 18:22, 18:23 <b>body</b> 10:14, 118:13 <b>bombardier</b> 18:5 <b>both</b> 44:2, 75:21, 82:18, 85:12, 133:8 <b>bottom</b> 108:6, 118:18, 119:16, 121:17 <b>boulder</b> 3:15 <b>boulevard</b> 6:10 <b>branch</b> 126:19, 127:21, 128:8, 130:5 <b>branches</b> 126:5, 126:11, 130:15 <b>brand</b> 101:23, 102:23, 103:20, 104:4, 104:13, 104:25, 105:6, 105:8, 105:9, 110:23 <b>brand-specific</b> 110:23 <b>brands</b> 104:15, 106:11 <b>break</b> 7:1, 34:12, 34:19, 35:25, 78:15, 78:18,	113:13, 113:25, 131:7, 131:9 <b>brewing</b> 20:15 <b>brick</b> 126:11 <b>bring</b> 89:24 <b>broadly</b> 76:16 <b>broadway</b> 3:14 <b>broke</b> 114:2, 114:5 <b>browser</b> 101:14, 112:12, 112:18, 112:24 <b>browsers</b> 112:14 <b>browsing</b> 113:2, 113:15 <b>budget</b> 106:6 <b>bullet</b> 80:10, 80:23 <b>bullets</b> 80:3, 82:9 <b>bunch</b> 53:10 <b>burden</b> 110:19, 110:20 <b>business</b> 24:16 <b>button</b> 112:22 <b>buying</b> 125:15 <hr/> <b>C</b> <hr/> <b>cache</b> 101:14, 113:1, 113:5, 113:15, 113:22, 114:7, 114:14, 114:15, 114:20 <b>calculate</b> 116:6 <b>calculation</b> 119:19, 125:8	<b>california</b> 6:11 <b>call</b> 6:6, 23:16, 53:14, 81:1 <b>called</b> 51:19, 66:15, 114:13, 117:3 <b>calls</b> 31:24, 32:20, 34:6, 35:8, 37:24, 43:4, 44:6, 100:24, 126:23, 132:8, 133:12 <b>came</b> 92:13 <b>can't</b> 27:12, 27:17, 28:6, 32:22, 33:6, 51:22, 75:20, 75:21, 92:6, 93:5, 101:3, 101:4, 102:14, 128:18 <b>card</b> 77:5 <b>career</b> 9:7, 42:10 <b>carla</b> 1:25, 2:9, 121:11, 136:3, 136:19 <b>cases</b> 8:14, 10:18, 11:18, 20:14, 21:5, 21:12, 21:14, 35:14, 68:5, 74:9, 113:22, 113:23 <b>categories</b> 124:18 <b>category</b> 101:23, 102:24, 103:13, 103:19, 124:17, 125:8 <b>caveat</b> 106:24	<b>celestial</b> 14:1, 14:11, 17:1 <b>cell</b> 122:13, 122:25, 123:2, 125:7 <b>certain</b> 19:13, 37:18, 102:3 <b>certainly</b> 9:10, 91:10 <b>certificate</b> 136:1, 136:21 <b>certified</b> 2:10, 136:20 <b>certify</b> 136:5 <b>challenge</b> 23:21 <b>challenged</b> 23:19 <b>challenges</b> 24:1 <b>change</b> 31:1, 88:6, 88:8, 88:12, 88:14, 88:20 <b>changed</b> 86:21, 111:16 <b>channel</b> 51:10, 51:11 <b>characterize</b> 56:8, 57:11, 58:7 <b>charge</b> 28:24, 29:5 <b>charged</b> 29:15 <b>charges</b> 29:6, 29:9 <b>charging</b> 28:18, 28:22, 29:7 <b>chat</b> 10:8, 52:14, 91:20, 96:9, 97:2, 118:13, 120:3, 121:8
---	---	---	--



<b>check</b> 25:25, 34:13 <b>checking</b> 64:19 <b>chips</b> 32:14 <b>chose</b> 93:7 <b>chronological</b> 11:5 <b>circumstance</b> 50:10 <b>circumstances</b> 44:11, 46:17, 88:13, 88:19, 133:7 <b>citation</b> 62:15, 70:17 <b>citations</b> 70:14, 73:15 <b>cite</b> 51:24, 52:8, 60:10, 62:8, 62:13, 64:18, 70:7, 70:9, 80:2 <b>cited</b> 53:10, 61:12, 62:4, 62:10, 62:22, 64:6, 64:11, 68:5, 68:9, 69:4, 70:21, 73:15, 129:23 <b>citing</b> 62:3 <b>city</b> 3:7 <b>civil</b> 1:6 <b>claim</b> 88:18 <b>clarified</b> 31:4 <b>clarify</b> 12:6, 12:21, 26:17, 65:19, 81:6, 114:11 <b>classified</b> 116:12, 117:1,	117:6, 124:5, 124:13 <b>clause</b> 31:21 <b>clear</b> 17:25, 22:24, 26:24, 49:25, 83:21, 86:25, 113:1, 113:5, 114:14, 114:19, 114:23 <b>cleared</b> 114:6, 114:7 <b>clearing</b> 113:15, 113:22 <b>clearly</b> 7:19, 14:22, 15:2 <b>client</b> 95:8, 99:8 <b>clients</b> 74:18, 75:19 <b>closed</b> 126:20, 127:7, 127:18, 127:24, 128:9 <b>closely</b> 19:13 <b>closer</b> 87:25 <b>club</b> 36:7, 36:11, 40:22 <b>co-counsel</b> 91:15, 93:2 <b>codes</b> 120:19 <b>coffee</b> 18:23 <b>colleague</b> 25:24, 26:3, 26:5 <b>colorado</b> 3:15, 83:25 <b>column</b> 122:12, 123:17, 123:21, 123:22, 123:25, 124:9	<b>columns</b> 122:19, 122:24, 122:25, 123:2 <b>come</b> 30:21, 30:25, 32:16, 32:18 <b>comes</b> 41:16, 106:16 <b>coming</b> 51:16 <b>commenting</b> 45:11 <b>common</b> 107:16, 107:17, 107:19, 109:9, 109:21 <b>commonly</b> 102:10, 107:22 <b>communications</b> 8:8 <b>companies</b> 54:11, 80:24 <b>company</b> 19:16, 32:16, 32:18, 48:1, 48:8 <b>compensation</b> 29:21 <b>competing</b> 60:18, 61:9 <b>competitive</b> 57:3, 100:20, 133:10 <b>complete</b> 11:17, 30:1, 30:2, 42:17, 43:11, 135:5 <b>completely</b> 95:13 <b>compound</b> 19:25, 33:8, 42:20, 63:18, 86:22, 88:15 <b>computer</b> 101:9 <b>concept</b> 66:15 <b>concern</b> 76:19, 76:24	<b>concerning</b> 8:17, 18:8 <b>conclude</b> 61:8, 63:14, 67:18, 116:19 <b>concluded</b> 104:15, 134:10 <b>conclusion</b> 31:25, 32:21, 34:6, 35:2, 35:9, 37:6, 37:25, 55:1, 129:16 <b>condition</b> 104:16, 104:23 <b>conditions</b> 57:6, 57:16, 102:3, 102:4, 104:3, 104:9, 104:12, 104:19, 104:21, 106:8, 106:20, 107:6, 107:13, 107:14, 114:3, 133:7 <b>conduct</b> 16:14, 17:17, 18:13, 18:14, 18:25, 20:9, 21:7, 21:19, 21:24, 22:4, 22:25, 23:3, 23:4, 36:20, 46:9, 52:20, 52:25, 53:16, 65:12, 65:25, 67:8, 67:25, 105:13, 109:15, 127:23, 130:10 <b>conducted</b> 1:19, 2:1, 8:22, 9:6, 22:13, 22:17, 28:3, 31:19, 37:9, 40:15, 40:20, 41:1, 41:5, 41:8, 41:19, 46:6, 49:3, 50:19,
---	--	---	---

66:7, 67:17, 67:23, 68:25, 73:16, 74:14, 78:6, 79:9, 86:7, 101:3, 101:5, 101:11, 101:13, 107:1, 107:24, 114:12, 132:1, 132:19, 132:20, 133:16 <b>conducting</b> 8:13, 54:14, 100:21, 131:24 <b>conducts</b> 89:2 <b>confidential</b> 65:6, 74:19, 75:18 <b>confirm</b> 64:9 <b>confused</b> 32:16, 63:22 <b>confusion</b> 8:24, 9:2, 9:9, 13:22, 14:3, 14:15, 16:3, 16:6, 16:20, 19:5, 19:21, 20:9, 20:25, 21:8, 21:16, 21:20, 21:25, 22:5, 22:8, 22:13, 22:17, 22:25, 26:13, 27:14, 27:20, 28:3, 28:8, 31:10, 31:11, 31:16, 31:20, 31:22, 31:23, 32:2, 32:5, 32:8, 32:19, 33:4, 33:5, 33:6, 34:4, 34:5, 34:21, 34:22, 34:23, 35:6, 35:11, 35:22, 36:14, 36:21, 37:5,	38:25, 40:16, 40:21, 41:2, 41:8, 41:19, 42:12, 43:21, 44:5, 44:10, 44:12, 44:14, 46:18, 47:1, 48:16, 49:6, 50:17, 51:19, 52:1, 53:6, 53:23, 54:1, 54:6, 54:15, 54:24, 55:10, 55:16, 56:16, 100:23, 111:8, 122:16, 122:22, 133:20 <b>conservative</b> 113:6, 113:9 <b>consider</b> 58:5, 58:9, 58:12, 59:5, 59:11, 60:11, 60:17, 60:23, 62:2, 73:1, 73:5, 73:25 <b>consumer</b> 34:1, 37:22, 38:6, 38:14, 39:1, 39:7, 39:20, 40:4, 46:3, 46:8, 47:5, 47:7, 47:14, 48:3, 48:11, 49:1, 49:8, 49:13, 50:2, 50:13, 50:16, 50:22, 50:24, 51:4, 59:9, 59:10, 59:12, 59:17, 59:18, 62:19, 66:21, 68:9, 69:6, 70:4, 72:22, 73:13, 74:4, 74:6, 74:11, 74:23, 75:5, 76:4,	76:6, 78:8, 78:9, 102:7, 102:12, 105:12, 110:24, 125:15, 128:17, 133:11 <b>consumer-facing</b> 76:19 <b>consumers</b> 47:20, 48:15, 58:22, 64:24, 65:13, 66:1, 66:9, 66:18, 68:16, 68:21, 68:25, 69:20, 69:21, 71:11, 72:4, 72:17, 72:25, 73:9, 76:10, 77:4, 78:7, 102:9, 107:22, 125:23, 129:8 <b>contacted</b> 7:14, 7:18 <b>contain</b> 42:17 <b>contents</b> 96:18 <b>context</b> 22:5, 22:9, 22:18, 23:13, 26:12, 32:9, 47:2, 51:1, 54:15, 55:6, 59:21, 65:13, 65:15, 65:16, 66:10, 68:16, 74:15, 74:20, 74:23, 75:4 <b>continue</b> 124:1 <b>continues</b> 54:25, 66:16 <b>control</b> 118:4, 123:1 <b>cookies</b> 32:13 <b>copies</b> 86:13, 86:15	<b>copy</b> 9:13, 9:20, 9:24, 86:10 <b>correct</b> 7:10, 10:23, 11:2, 12:7, 13:17, 21:21, 22:14, 22:23, 23:2, 23:4, 23:5, 24:21, 26:22, 27:7, 29:9, 36:15, 36:22, 39:20, 40:24, 42:5, 42:6, 46:24, 47:2, 52:4, 52:6, 53:11, 60:4, 72:19, 81:22, 83:14, 83:15, 83:19, 84:10, 84:11, 85:13, 85:17, 93:1, 96:14, 96:21, 98:17, 103:16, 112:5, 112:8, 113:19, 115:17, 117:10, 117:14, 118:2, 119:3, 119:4, 119:21, 125:11, 126:18, 127:1, 127:11, 129:12, 129:13, 135:5, 136:6 <b>corrected</b> 79:5, 100:6, 125:2 <b>corrections</b> 135:6 <b>costco</b> 12:18, 13:2, 13:6 <b>could</b> 14:25, 20:5, 21:23, 27:5, 32:5, 34:12, 36:17, 44:4, 44:8, 44:9,
--	---	--	---

46:19, 48:6, 65:7, 103:4, 113:16, 113:18, 113:20, 114:22, 118:22, 120:14 <b>couldn't</b> 32:1, 32:22, 32:24, 32:25, 47:16 <b>counsel</b> 5:2, 5:6, 5:10, 7:15, 7:18, 25:16, 25:22, 92:4, 96:11, 96:17, 136:10 <b>count</b> 119:5, 125:4, 125:5 <b>counted</b> 117:9, 123:5 <b>counterclaim</b> 1:8, 3:2 <b>counterclaimant</b> 1:15, 3:11 <b>counting</b> 125:10 <b>country</b> 13:25 <b>couple</b> 11:4 <b>course</b> 24:6, 24:10, 25:14, 54:18, 115:6 <b>court</b> 1:1, 23:8, 32:10, 33:9, 33:16, 34:8, 34:24, 35:10, 35:19, 35:20, 38:23, 47:13, 48:24, 92:15, 95:4, 109:19, 128:24, 136:3 <b>courts</b> 32:3, 46:25 <b>covid</b> 125:14, 125:24,	126:4, 126:10, 127:5, 127:24, 128:9 <b>create</b> 48:2, 48:21 <b>creates</b> 105:11 <b>creating</b> 16:2 <b>credit</b> 1:5, 1:11, 7:10, 24:8, 24:11, 24:15, 24:18, 24:24, 25:5, 65:14, 65:16, 66:2, 67:10, 67:19, 68:1, 68:12, 68:15, 69:6, 69:9, 69:18, 69:23, 71:2, 71:4, 71:17, 71:21, 72:1, 72:7, 73:2, 73:6, 73:21, 74:11, 74:24, 75:6, 76:7, 76:14, 76:20, 76:25, 77:5, 77:6, 77:7, 77:13, 78:4, 78:8, 79:1, 81:12, 81:13, 81:15, 82:21, 83:23, 83:24, 84:4, 84:12, 84:20, 85:7, 85:8, 85:9, 85:19, 85:22, 85:25, 86:11, 87:11, 87:19, 98:7, 98:20, 99:5, 99:8, 99:19, 99:23, 100:2, 100:8, 100:15, 101:24, 105:15, 105:18, 106:1, 108:7,	125:16, 126:6, 126:12, 126:19, 126:22, 127:6, 127:17, 127:25, 128:6, 129:9, 130:4, 130:9, 130:15, 130:18, 130:21, 131:3, 131:12, 132:5 <b>criteria</b> 49:12, 50:1, 50:5, 50:9, 50:23, 51:6, 101:16, 101:19, 102:17, 119:6 <b>criticism</b> 115:9 <b>criticisms</b> 63:21, 80:21 <b>criticized</b> 80:21, 81:25 <b>critique</b> 14:7, 15:17, 16:17, 17:4, 17:7, 17:19, 20:22 <b>critiqued</b> 16:5, 17:2, 18:16, 19:2 <b>critiques</b> 26:7 <b>cross</b> 17:14 <b>crosstalk</b> 49:17, 70:12, 76:21, 80:15, 104:1, 123:16, 127:20 <b>ct</b> 1:21 <b>curious</b> 131:15, 131:16 <b>current</b> 130:20, 131:2 <b>currently</b> 6:17, 7:24, 91:24 <b>customers</b> 24:24, 25:5,	25:10, 69:19, 71:16, 78:7, 127:7, 127:8, 128:1, 128:11, 130:4, 130:10, 130:20, 131:2 <b>cut</b> 63:6 <b>cv</b> 27:10 <hr/> <b>D</b> <hr/> <b>data</b> 64:10, 72:8, 72:23, 73:7, 73:12, 73:23, 118:23, 120:18, 120:21, 121:21, 123:3, 123:20, 125:22, 130:2, 130:8 <b>database</b> 116:8 <b>date</b> 13:4, 27:16, 27:18, 30:2, 135:12 <b>dated</b> 93:14 <b>daubert</b> 23:16 <b>day</b> 47:21, 90:10, 136:15 <b>days</b> 86:20, 86:23, 91:9 <b>deal</b> 94:11 <b>dealt</b> 9:7 <b>decided</b> 94:19 <b>deciding</b> 69:17, 72:6 <b>decision</b> 66:19, 66:22, 68:3, 69:19,
---	--	--	--

72:4, 72:13, 73:10, 74:1, 76:12, 108:19 <b>decision-making</b> 59:18, 70:5, 70:10, 72:22, 73:13, 74:6, 76:4, 129:23 <b>decisions</b> 66:21, 67:7, 68:19 <b>deemed</b> 57:17 <b>defendant</b> 1:9, 1:14, 3:3, 3:11, 12:2, 18:13, 18:14, 99:23, 113:11, 116:16, 124:15 <b>defendant's</b> 18:19 <b>defender</b> 18:9 <b>define</b> 115:19, 115:21 <b>degree</b> 66:18, 68:17, 68:18, 68:22 <b>deliberately</b> 113:5 <b>delta</b> 116:10 <b>demonstrate</b> 101:20, 107:3, 110:19, 110:21, 131:25 <b>demonstrating</b> 101:17 <b>depend</b> 35:19 <b>dependent</b> 51:1 <b>depends</b> 59:15 <b>deponent</b> 135:1 <b>depose</b> 90:14	<b>deposed</b> 11:24 <b>deposition</b> 1:18, 2:1, 4:8, 6:7, 8:5, 8:6, 10:19, 10:25, 12:25, 30:10, 30:13, 30:15, 30:21, 31:4, 31:6, 31:14, 45:8, 52:14, 89:18, 90:3, 90:9, 90:19, 91:14, 91:16, 92:2, 92:5, 92:6, 93:4, 93:5, 93:8, 94:1, 94:18, 95:4, 95:17, 96:11, 110:3, 118:12, 119:25, 136:4 <b>depositions</b> 10:3 <b>describe</b> 31:10, 35:5, 51:5, 56:21, 57:7, 57:10, 57:11, 57:14, 57:15, 64:18, 66:20, 71:10, 79:23, 80:3, 80:11, 82:9, 82:11, 82:13 <b>described</b> 16:24, 19:6, 19:13, 34:4, 46:5, 56:6, 56:8, 56:20, 66:17, 83:16, 106:9, 108:9, 120:15 <b>describes</b> 57:25, 58:1, 82:6, 82:15 <b>describing</b> 57:22 <b>description</b> 104:11	<b>descriptive</b> 102:24, 103:12 <b>design</b> 118:16 <b>designed</b> 8:21, 8:22, 110:2, 131:25 <b>despite</b> 113:8 <b>detail</b> 71:10 <b>detailed</b> 69:7, 69:21 <b>determine</b> 33:10, 33:17, 34:8, 34:25, 35:20, 39:18, 46:1, 47:13, 48:25, 49:7, 50:1, 58:3, 64:5, 109:19, 112:23, 130:9 <b>determining</b> 49:12 <b>developed</b> 76:1 <b>device</b> 101:8, 112:9 <b>differences</b> 58:13, 58:16, 58:19 <b>different</b> 26:11, 47:19, 50:25, 56:21, 57:7, 61:8, 61:9, 61:21, 71:25, 83:7, 83:9, 83:11, 89:8, 112:2, 121:19, 121:20, 122:3, 123:11, 127:11, 128:3, 129:16 <b>differently</b> 44:9 <b>difficulties</b> 6:25, 7:7 <b>direct</b> 56:11	<b>directed</b> 55:15 <b>direction</b> 113:18, 113:21, 136:9 <b>directly</b> 46:10 <b>disagreeing</b> 127:15 <b>disclosed</b> 26:18, 41:25, 42:11 <b>discovery</b> 89:14, 90:21, 91:11 <b>discuss</b> 55:23, 55:24, 66:15, 72:4, 101:4, 129:21 <b>discussed</b> 56:6, 59:16, 100:18 <b>discusses</b> 54:16, 54:20, 68:16, 70:22 <b>discussing</b> 55:7, 55:19, 58:2, 72:17, 72:25 <b>discussion</b> 6:24, 7:6, 55:9, 57:21, 67:5, 70:15, 89:11 <b>discussions</b> 93:10 <b>disposal</b> 129:6 <b>dispute</b> 44:12, 51:2, 108:10, 108:20, 109:23 <b>distinction</b> 81:23 <b>distinguish</b> 124:16 <b>distributed</b> 52:12
---	---	--	---

<b>distribution</b> 51:10, 51:11 <b>district</b> 1:1, 1:2 <b>doctor</b> 34:13, 49:21, 119:8, 119:15 <b>doctoral-level</b> 74:7 <b>document</b> 44:20, 64:1, 73:16, 91:22, 97:4, 97:22, 98:16, 101:7, 109:1, 109:2, 122:2, 132:21 <b>documents</b> 30:4, 89:12, 90:5, 90:20, 90:25, 91:7, 91:13, 91:23, 92:1, 92:5, 92:12, 93:3, 93:11, 93:19, 93:25, 94:2, 94:5, 94:13, 94:17, 94:23, 95:7, 95:22, 96:8, 96:19, 97:18 <b>dog</b> 119:17 <b>doing</b> 29:4, 51:6, 87:22, 87:25, 90:9, 95:7, 111:17 <b>done</b> 25:24, 43:23, 44:4, 44:10, 46:19, 62:10, 64:23, 74:14, 91:8, 98:3, 109:25, 110:2, 112:6 <b>doorway</b> 90:4, 90:7 <b>double</b> 117:24, 125:4,	125:10 <b>down</b> 124:8, 125:17, 125:25 <b>download</b> 52:16 <b>dozens</b> 47:20 <b>dr</b> 5:9, 5:13, 6:4, 6:6, 6:8, 6:16, 7:8, 7:24, 8:11, 8:20, 9:12, 10:7, 10:10, 10:13, 21:4, 22:3, 23:6, 24:3, 27:4, 28:18, 34:20, 36:2, 36:12, 41:18, 42:15, 43:16, 43:21, 44:3, 51:17, 52:15, 58:5, 78:20, 93:13, 94:4, 96:1, 96:22, 97:8, 97:20, 97:24, 100:17, 110:8, 114:1, 115:7, 118:11, 121:16, 125:13, 131:8, 132:24 <b>dress</b> 13:14, 15:3, 37:18, 37:21, 38:5, 39:6, 39:11, 39:12, 39:14, 39:19, 40:3 <b>drill</b> 87:9 <b>drinks</b> 32:13 <b>drl</b> 19:15 <b>due</b> 6:24, 7:6 <b>during</b> 6:7, 8:6, 8:11,	8:21, 90:9, 93:9, 94:17, 125:14, 125:24, 126:4, 126:9, 127:5, 127:24, 128:9, 131:8 <hr/> <b>E</b> <b>e-mails</b> 8:7 <b>e-n-c-i-n-o</b> 6:14 <b>e-trans</b> 134:7 <b>each</b> 11:4, 99:12, 108:14, 112:9, 112:10, 112:12, 112:25, 114:6, 114:7, 116:11, 117:1, 117:5, 122:11, 123:22, 125:3 <b>earlier</b> 40:12, 45:6, 67:22, 87:22, 100:19 <b>early</b> 7:13 <b>easier</b> 9:19 <b>easily</b> 118:23 <b>effect</b> 73:12, 74:5, 129:22 <b>effectually</b> 89:22 <b>eg</b> 104:25 <b>eighth</b> 124:10 <b>either</b> 9:7, 12:25, 23:8, 23:22, 31:13, 31:22, 34:2, 34:22, 45:2, 46:2,	46:10, 46:14, 71:16, 71:22, 105:8, 110:7 <b>elements</b> 37:19, 37:22, 38:5 <b>elevate</b> 1:4, 7:9, 24:7, 78:25, 81:12, 81:14, 83:23, 85:7, 85:8, 85:9, 85:19, 85:22, 85:25, 86:11, 87:11, 87:18, 98:7, 98:20, 99:8, 99:19, 100:2, 100:8, 100:15, 101:24, 102:8, 102:14, 105:14, 105:18, 106:1, 108:6, 116:15, 116:18, 116:21, 116:23, 117:11, 122:9, 124:14, 126:5, 126:12, 127:6, 127:25, 128:4, 128:7, 128:8, 131:3, 131:12, 132:4, 132:5, 132:25, 133:1 <b>elevate's</b> 130:19 <b>elevation</b> 81:13 <b>elevations</b> 1:11, 82:21, 84:4, 84:12, 84:20, 96:16, 99:5, 99:23, 108:7, 116:21, 116:24, 117:12, 122:10, 128:10, 130:20, 131:2, 132:4 <b>eligible</b> 130:20, 131:2
--	---	---	---



<p><b>else</b> 30:14, 33:12, 43:8, 51:14, 63:16, 73:8, 79:22 <b>employed</b> 136:10 <b>employer</b> 29:6, 29:7 <b>enable</b> 33:13 <b>encino</b> 6:14 <b>encountered</b> 34:2 <b>end</b> 10:18 <b>ended</b> 10:4 <b>engaged</b> 11:1, 66:22 <b>engages</b> 105:18 <b>engine</b> 59:13, 59:22, 60:8, 62:6, 63:17, 63:20, 63:25, 66:2, 67:3, 79:1, 81:21, 82:19, 82:25, 83:7, 84:14, 84:17, 84:21, 85:2, 87:19, 98:8, 101:21, 108:12, 114:4 <b>engines</b> 58:6, 58:10, 58:14, 58:19, 58:22, 59:2, 60:13, 60:19, 61:5, 61:9, 61:16, 61:21, 61:22, 62:12, 64:24, 65:13, 66:1, 67:9, 67:13, 70:7, 82:4, 88:12,</p>	<p>89:3, 112:3 <b>enough</b> 33:4, 109:20, 109:21 <b>enter</b> 92:1 <b>entered</b> 90:2, 90:22, 91:8 <b>enterprises</b> 19:15 <b>entire</b> 57:19, 90:10, 120:4 <b>entry</b> 123:8 <b>equivalent</b> 109:10 <b>errata</b> 135:7 <b>errors</b> 25:25 <b>esquire</b> 3:4, 3:12 <b>essentially</b> 89:14, 90:23, 91:24, 92:22, 95:9 <b>established</b> 88:10, 112:1 <b>estimate</b> 9:7 <b>et</b> 19:16 <b>evaluate</b> 110:5 <b>evaluated</b> 51:12, 51:13 <b>evaluating</b> 132:22 <b>evaluations</b> 70:5 <b>even</b> 60:15, 92:13, 94:25, 101:12, 106:25, 107:6, 107:23 <b>ever</b> 23:6, 23:19,</p>	<p>24:6, 24:11, 41:19, 41:24, 42:10, 49:3, 49:5, 49:11, 50:10, 51:6, 55:1, 58:20, 58:21, 58:25, 59:20, 64:23, 82:21, 84:3, 84:19 <b>ever-constant</b> 51:20, 52:2 <b>ever-evolving</b> 51:20, 52:3, 55:13 <b>eveready</b> 13:19, 14:17, 16:22, 17:23, 17:24, 18:20, 18:21, 19:11, 19:12, 37:8, 37:10, 37:23, 38:7, 38:12, 38:24, 39:2, 39:4, 39:24, 44:18, 45:3, 45:15, 45:22, 46:4, 47:6, 47:10, 48:4, 48:11, 48:15, 48:22, 49:5, 49:14, 50:3, 50:18, 50:24, 51:7, 51:20, 52:2, 55:6 <b>every</b> 47:20, 96:7, 96:18, 113:3 <b>everybody</b> 117:10 <b>everything</b> 110:11, 121:24 <b>evidence</b> 89:25, 90:2 <b>exactly</b> 19:14, 53:19, 63:9, 63:13, 92:10</p>	<p><b>examination</b> 4:3, 5:23 <b>examined</b> 135:3 <b>example</b> 27:23, 31:9, 31:18, 33:11, 41:11, 50:12, 62:10, 67:11, 68:20, 121:3, 123:7, 124:7 <b>examples</b> 51:11 <b>excel</b> 120:9, 120:22, 121:16, 122:11 <b>except</b> 63:16, 114:8 <b>exception</b> 25:16 <b>exclude</b> 23:14 <b>excluded</b> 23:8, 23:10, 23:22, 89:15, 90:6 <b>excludes</b> 55:14 <b>excuse</b> 34:11, 119:8 <b>exercise</b> 67:21 <b>exhibit</b> 4:9, 4:11, 4:12, 4:14, 4:15, 4:17, 4:19, 10:1, 10:5, 10:8, 24:5, 52:10, 52:13, 52:18, 91:15, 91:17, 91:19, 92:5, 92:7, 93:4, 93:6, 96:10, 96:13, 96:16, 96:23, 96:24, 97:1, 97:9, 99:16, 100:19,</p>
--	---	---	---

103:4, 106:11, 106:14, 106:18, 107:1, 107:25, 108:3, 118:9, 118:12, 118:13, 119:17, 119:21, 119:25, 120:1, 120:3, 120:13, 120:17, 121:7, 121:9, 121:13, 121:18 <b>exhibits</b> 4:8, 8:5, 10:2, 68:6, 91:14 <b>exists</b> 129:5 <b>expenditures</b> 106:6 <b>experience</b> 35:3, 35:21, 75:22, 75:24, 88:4, 128:17 <b>expert</b> 4:9, 4:14, 9:12, 9:14, 10:10, 10:19, 10:22, 11:1, 11:12, 11:18, 11:23, 12:24, 14:8, 14:14, 17:7, 17:22, 18:14, 18:16, 18:19, 19:3, 19:10, 21:13, 21:14, 23:7, 23:15, 26:8, 26:18, 26:21, 27:13, 27:20, 28:7, 33:18, 35:4, 38:1, 40:15, 41:25, 42:3, 42:4, 42:11, 58:6, 58:9, 58:13, 58:17, 58:18, 58:21, 59:1, 59:6, 59:12, 59:19, 59:21,	60:12, 60:18, 60:24, 61:13, 88:22, 89:4, 90:1, 92:7, 93:3, 93:6 <b>expert's</b> 93:7, 93:8 <b>expertise</b> 62:5, 70:3, 70:6, 72:20, 74:4, 75:10, 75:22, 76:2, 88:11, 88:19, 129:1, 129:4 <b>experts</b> 35:4 <b>explain</b> 31:12, 121:24 <b>explained</b> 102:21, 122:3 <b>explains</b> 120:19 <b>explanation</b> 43:18, 102:21, 116:3 <b>explanations</b> 43:6, 116:1 <b>exposed</b> 47:20 <b>exposure</b> 47:7, 104:25, 105:9, 105:10, 105:11 <b>express</b> 42:18, 43:2 <b>expressly</b> 44:17 <b>extent</b> 45:10, 59:8, 66:5, 75:12, 97:14, 105:24, 106:2 <hr/> <b>F</b> <hr/> <b>fabian</b> 3:5, 7:21, 25:12 <b>face</b> 106:19	<b>facebook</b> 100:14 <b>fact</b> 5:9, 95:14 <b>failed</b> 81:24 <b>fair</b> 31:8, 54:8, 60:11, 61:8, 63:14, 81:1, 101:13, 128:25 <b>familiar</b> 16:4, 23:16, 33:4, 33:6, 51:17, 56:14, 56:18, 56:19, 107:23 <b>familiarity</b> 104:13, 104:15, 105:8 <b>family</b> 72:5, 72:18 <b>famous</b> 39:16 <b>far</b> 103:23, 103:24 <b>fareportal</b> 16:11, 17:6 <b>favor</b> 90:21 <b>favorable</b> 109:11 <b>fcu</b> 108:6 <b>federal</b> 1:4, 7:10, 24:7, 81:12, 81:14, 83:23, 85:7, 85:19, 85:25, 86:11, 105:15, 105:18, 105:25, 106:1, 126:6, 126:12, 127:6, 127:25, 131:3 <b>female</b> 121:5 <b>few</b> 34:14, 79:12	<b>field</b> 129:1, 129:3 <b>fields</b> 62:18 <b>figure</b> 65:23, 79:6, 87:13, 89:9, 111:13, 111:19, 111:20, 112:16, 114:17, 124:23, 125:9, 125:12 <b>figures</b> 112:18 <b>file</b> 23:14, 93:7, 118:23, 122:11, 123:20 <b>filed</b> 23:21, 92:20, 92:25 <b>financial</b> 68:19, 69:1, 73:1, 73:7, 73:22, 74:11, 74:15, 76:16, 77:16, 77:18, 77:19, 77:22, 125:23, 128:18, 136:12 <b>find</b> 22:7, 37:4, 37:20, 37:21, 62:22, 62:23, 63:1, 63:11, 63:25, 64:2, 66:13, 101:12, 113:9, 118:5 <b>findings</b> 65:6 <b>firm</b> 7:21, 25:13 <b>first</b> 10:1, 49:7, 56:13, 87:20, 98:15, 99:4, 101:2, 102:5, 102:20, 103:1, 108:5, 108:23,
---	--	--	---

109:3, 109:4, 120:11, 121:18, 123:7, 127:16, 132:4, 133:16, 133:17 <b>fit</b> 31:13 <b>five</b> 28:16 <b>flow</b> 99:13 <b>focus</b> 9:1, 67:4 <b>focused</b> 31:18 <b>folks</b> 24:16 <b>follow-up</b> 34:16 <b>followed</b> 120:15 <b>follows</b> 70:15 <b>foot</b> 128:9 <b>footnote</b> 44:24, 62:4, 62:16, 62:21, 62:23, 64:6, 64:11, 68:6, 68:10, 68:12, 70:19, 70:22, 71:1, 103:6, 103:9, 103:15, 104:20, 105:6, 106:21, 107:7, 107:14, 118:4, 122:6 <b>foregoing</b> 135:4, 136:4, 136:5 <b>forget</b> 120:23 <b>form</b> 34:10, 89:13, 94:18, 95:5, 97:19 <b>formally</b> 5:3	<b>format</b> 13:19, 13:20, 14:17, 14:18, 16:23, 17:3, 17:4, 17:8, 17:23, 18:20, 19:11, 19:14, 37:7, 37:8, 37:23, 38:8, 38:12, 39:4, 39:25, 41:21, 42:1, 42:12, 45:16, 46:19, 46:25, 47:6, 47:10, 48:12, 50:18, 51:20, 51:21, 52:2, 52:3, 55:13, 55:24, 56:8, 56:22, 57:4, 57:21, 57:22, 57:23, 57:25, 112:19, 120:23 <b>formats</b> 55:19 <b>formed</b> 75:16 <b>forming</b> 90:1 <b>forward</b> 31:10, 31:18, 31:22, 32:6, 32:19, 33:4, 34:4, 34:22, 35:7, 35:12, 38:24, 48:16, 79:12, 112:21 <b>found</b> 62:12, 62:25, 63:3, 63:13, 63:15, 63:16 <b>foundation</b> 98:11, 99:11, 99:15 <b>four</b> 10:20, 11:19, 20:15, 21:7, 21:15, 22:11,	22:20, 22:22, 26:25, 27:6, 28:5, 40:13, 42:7, 56:15, 56:25, 57:7, 83:7, 83:9, 83:11, 84:23, 112:2 <b>fourth</b> 100:4, 100:6, 124:8 <b>free</b> 29:4 <b>frequent</b> 109:20 <b>friday</b> 92:25 <b>friends</b> 72:6, 72:18 <b>ftc</b> 15:6 <b>full</b> 6:1 <b>further</b> 31:7, 134:1 <hr/> <b>G</b> <hr/> <b>gaby's</b> 11:10, 11:21, 12:12 <b>gather</b> 69:7, 69:21 <b>gave</b> 8:1, 12:24, 53:13 <b>gears</b> 115:7 <b>general</b> 52:20, 52:25, 70:6, 76:25, 77:17, 77:19, 77:20, 78:1, 78:3, 87:23, 97:14, 128:6, 130:4 <b>generally</b> 61:17, 61:18, 77:13, 98:11	<b>generating</b> 108:17 <b>generic</b> 102:24, 103:12, 103:21 <b>genericness</b> 16:8 <b>getting</b> 34:13, 87:24 <b>give</b> 12:20, 13:2, 38:5, 89:19, 99:14, 108:24, 120:20, 124:7 <b>given</b> 33:10, 34:9, 41:11, 46:17, 59:20, 117:5, 135:6, 136:6 <b>giving</b> 44:17, 109:10 <b>global</b> 15:6 <b>go</b> 6:4, 7:5, 9:20, 11:3, 12:17, 15:5, 29:10, 32:12, 33:11, 36:3, 37:14, 69:11, 69:20, 71:9, 78:3, 78:21, 79:12, 90:21, 100:1, 103:3, 103:4, 123:8, 127:22, 131:6 <b>goes</b> 99:22, 103:18, 103:22 <b>going</b> 12:5, 17:1, 17:15, 52:17, 89:11, 91:12, 91:21, 92:15, 93:10, 93:16, 95:18, 95:20, 95:21, 96:5, 97:11, 97:24,
--	--	--	--

<p>98:5, 98:10, 99:11, 117:25, 119:2, 119:17, 121:8, 122:5, 122:6, 125:18 <b>gone</b> 122:15, 125:17, 125:24 <b>good</b> 5:25, 14:25, 34:12, 78:15, 78:16 <b>goods</b> 54:6 <b>google</b> 4:12, 4:17, 60:8, 62:6, 79:1, 82:5, 82:19, 85:12, 85:13, 87:19, 89:8, 93:14, 93:17, 94:6, 96:2, 98:8, 98:20, 106:11, 108:12, 114:13 <b>grayed</b> 112:21 <b>green</b> 20:16, 20:23 <b>group</b> 6:17, 6:20, 8:12, 14:1 <b>guess</b> 17:15, 56:13, 97:13 <b>guidelines</b> 52:20 <b>guys</b> 49:20</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>habits</b> 68:25 <b>hain</b> 13:25, 14:10, 14:11, 17:1, 18:22 <b>hal</b> 89:7, 91:15,</p>	<p>93:14, 93:18, 94:7, 96:2, 96:11, 97:6, 97:7 <b>half</b> 72:11 <b>hand</b> 136:14 <b>happen</b> 131:9 <b>happy</b> 93:25, 95:23 <b>hard</b> 9:13, 9:20 <b>hart</b> 3:13 <b>head</b> 121:12 <b>heading</b> 53:21 <b>hear</b> 5:17, 119:11, 126:8, 132:13 <b>heard</b> 119:14 <b>help</b> 25:25 <b>henn</b> 51:19, 101:16, 101:19, 102:1, 102:17, 111:1, 111:4 <b>here</b> 7:3, 7:4, 40:21, 41:12, 61:12, 66:14, 66:17, 84:6, 85:5, 89:16, 89:17, 89:25, 90:2, 95:17, 102:4, 104:10, 104:22, 115:6, 116:5, 118:4, 118:8, 123:8 <b>hereby</b> 5:13, 5:18, 135:2, 136:5 <b>hereunto</b> 136:14</p>	<p><b>hey</b> 25:19 <b>high</b> 47:10 <b>high-involvement</b> 66:20, 66:22, 66:25, 67:6, 67:15, 67:20, 68:2, 69:19, 71:11, 73:19 <b>higher</b> 68:17, 68:21, 68:22, 117:21 <b>highly</b> 103:12 <b>himself</b> 110:23 <b>history</b> 101:14, 113:2, 113:16, 114:7, 114:16, 114:20 <b>holland</b> 3:13 <b>home</b> 112:22 <b>hundreds</b> 8:22 <b>hypothetical</b> 33:13, 34:1, 47:12, 126:24</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>id</b> 122:13, 123:8, 124:8 <b>idea</b> 105:17, 105:25, 128:19 <b>identical</b> 60:21 <b>identification</b> 10:6, 52:11, 91:18, 96:25, 118:10, 120:2, 121:14 <b>identified</b> 84:24 <b>identify</b> 40:20, 40:25,</p>	<p>50:9, 51:3, 51:5 <b>iii</b> 55:12 <b>image</b> 123:24 <b>impact</b> 66:8, 113:20, 113:21 <b>impacts</b> 70:10 <b>impartial</b> 101:13 <b>imprimis</b> 17:11 <b>in-person</b> 128:20 <b>inaccurate</b> 30:22 <b>inappropriate</b> 91:23, 95:13 <b>inappropriateness</b> 93:11 <b>include</b> 43:1, 76:18, 77:13 <b>included</b> 41:7, 42:24, 43:19, 120:24, 124:19 <b>including</b> 8:23, 43:11, 69:8, 69:22, 72:5, 72:18, 128:17 <b>incognito</b> 114:13, 115:2, 115:4 <b>incomplete</b> 47:11, 126:24 <b>inconvenient</b> 123:21 <b>indeed</b> 103:18 <b>independent</b> 39:21, 40:1, 45:25, 62:5 <b>independently</b> 39:18</p>
---	--	---	--

<p><b>indicate</b> 101:20, 109:18, 116:13, 124:4, 125:22</p> <p><b>indicated</b> 45:9, 72:12, 87:7, 102:12, 116:17, 116:20, 123:3, 123:23</p> <p><b>indicates</b> 107:15, 123:3</p> <p><b>indications</b> 99:1</p> <p><b>individually</b> 77:9</p> <p><b>industry</b> 24:12, 24:18, 75:13</p> <p><b>influence</b> 113:16, 113:18</p> <p><b>information</b> 33:11, 34:9, 40:7, 55:25, 64:7, 66:9, 66:23, 66:24, 69:7, 69:22, 71:13, 72:17, 72:23, 72:24, 72:25, 73:5, 73:9, 73:24, 73:25, 76:11, 101:10, 108:5, 125:22, 129:5, 129:24, 130:3, 130:9</p> <p><b>informed</b> 76:1</p> <p><b>informs</b> 75:13</p> <p><b>infringed</b> 13:13, 14:21</p> <p><b>infringement</b> 12:10, 12:13, 13:7, 14:12, 37:2</p> <p><b>infringer</b> 12:5</p> <p><b>initial</b> 107:8, 120:25</p>	<p><b>initially</b> 120:4</p> <p><b>instance</b> 121:4</p> <p><b>instead</b> 5:4</p> <p><b>institution</b> 24:15, 69:1, 73:2, 73:7</p> <p><b>institutions</b> 68:19, 73:22, 74:12, 74:16, 77:17, 77:18, 77:20, 128:18</p> <p><b>instruct</b> 91:21, 95:11, 95:12, 95:19, 95:21, 96:5, 97:17</p> <p><b>instructing</b> 94:24, 96:12, 96:19</p> <p><b>instruction</b> 93:24</p> <p><b>intended</b> 31:15, 32:9</p> <p><b>intentionally</b> 114:8, 114:11, 114:23</p> <p><b>intercepting</b> 43:24</p> <p><b>interest</b> 136:12</p> <p><b>internet</b> 43:23, 47:22, 53:16, 53:23, 54:2, 54:7, 54:15, 54:24, 55:2, 55:10, 55:14, 55:17, 55:19, 56:1, 56:7, 56:17, 56:22, 57:3, 58:6, 58:22, 59:2, 59:22, 61:5, 61:9, 61:10, 61:15, 61:21, 63:1,</p>	<p>63:3, 63:8, 63:12, 63:15, 63:17, 63:20, 63:24, 66:1, 67:2, 67:3, 67:13, 67:20, 68:1, 78:25, 79:7, 79:9, 79:14, 79:18, 79:23, 80:3, 80:8, 80:9, 80:11, 80:16, 80:23, 80:25, 81:1, 81:3, 81:8, 81:10, 81:17, 81:20, 82:1, 82:3, 82:6, 82:10, 82:11, 82:13, 82:25, 83:7, 84:12, 84:13, 84:16, 84:17, 84:21, 85:2, 86:15, 88:5, 88:12, 88:20, 88:24, 89:3, 89:5, 94:6, 98:6, 101:21, 103:18, 111:7, 114:4, 125:16, 125:24, 129:9</p> <p><b>internet-based</b> 54:20</p> <p><b>interpretation</b> 121:6</p> <p><b>interprets</b> 121:21</p> <p><b>interrupting</b> 99:13</p> <p><b>introduce</b> 97:15</p> <p><b>introduced</b> 56:25</p> <p><b>investigation</b> 46:1, 65:25, 67:8, 87:24</p> <p><b>investors</b> 77:22</p>	<p><b>invoices</b> 29:19</p> <p><b>involve</b> 74:10, 77:25, 78:2, 89:3</p> <p><b>involved</b> 8:13, 49:4, 49:5, 49:11, 74:10, 74:22, 75:3</p> <p><b>involvement</b> 66:8, 66:16, 66:17, 68:9, 68:18, 68:22, 68:23, 70:4, 70:16, 72:21, 73:13, 74:5, 75:15, 76:3, 129:21, 129:22</p> <p><b>involvements</b> 70:9</p> <p><b>involving</b> 28:4</p> <p><b>issue</b> 8:17, 15:3, 15:4, 22:16, 37:16, 38:6, 38:13, 38:17, 39:12, 39:14, 59:16, 67:15, 80:20, 101:25, 102:2, 133:23</p> <p><b>issued</b> 11:18, 22:10, 22:12</p> <p><b>issues</b> 9:5, 53:7</p> <p><b>item</b> 80:17, 81:4, 81:8, 81:11, 82:25, 83:4, 83:5</p> <p><b>itself</b> 44:21, 48:2, 50:16, 114:19</p> <p><b>iv</b> 55:16, 56:6, 56:16, 57:20,</p>
---	---	--	---



115:15 <b>ix</b> 80:3, 82:2, 82:10, 83:5	<b>K</b> <b>keep</b> 99:12, 110:4, 110:7 <b>keyword</b> 32:8, 84:18, 101:22, 102:6 <b>kimbrough</b> 1:25, 2:9, 136:3, 136:19 <b>kind</b> 13:23, 16:7, 19:23, 21:2, 23:4, 26:1, 47:1, 53:8, 109:24, 110:4, 112:21, 121:6 <b>kinds</b> 32:2, 33:6 <b>kirsten</b> 3:4, 93:20, 94:12 <b>know</b> 12:23, 15:2, 20:10, 20:12, 20:13, 23:10, 25:25, 28:13, 29:18, 32:7, 33:13, 33:18, 34:3, 39:10, 42:9, 42:21, 43:7, 44:8, 44:9, 48:16, 53:19, 55:13, 56:1, 57:23, 60:9, 61:2, 61:5, 64:13, 71:15, 71:25, 73:9, 73:24, 77:8, 85:20, 85:24, 86:12, 86:18, 87:6, 87:21, 88:5, 88:7, 89:11, 89:13, 92:8, 92:13, 93:17, 94:14, 97:10,	98:3, 101:2, 105:21, 106:5, 106:16, 106:20, 108:3, 109:1, 109:17, 111:18, 113:4, 113:17, 113:21, 115:1, 118:22, 122:2, 122:18, 125:20, 126:3, 126:9, 126:16, 126:18, 128:13, 128:15, 130:3, 130:18, 132:21, 133:5, 133:9, 133:22 <b>knowing</b> 101:5 <b>knowledge</b> 62:5, 62:18, 75:13 <b>known</b> 31:16, 45:10, 46:23, 104:12, 104:13, 105:8	78:24, 79:3, 119:11, 125:13, 126:4, 126:9, 126:20, 129:11 <b>law</b> 7:21, 25:13 <b>lawsuit</b> 100:12 <b>lead</b> 49:1 <b>leading</b> 115:10, 115:16, 115:19, 115:20, 115:21, 115:23, 116:2 <b>leads</b> 100:10 <b>least</b> 11:24, 12:24, 113:4, 113:23, 114:10, 117:7, 120:5, 130:17 <b>led</b> 125:9 <b>left</b> 112:20, 114:8, 114:9, 114:10 <b>legal</b> 31:24, 32:20, 34:6, 35:2, 35:8, 37:24 <b>let's</b> 7:5, 9:25, 12:17, 15:5, 49:24, 87:10, 91:12, 95:24, 103:3, 103:6, 122:18, 131:6 <b>level</b> 38:14, 39:7, 39:20, 40:3, 45:2, 47:14, 48:3, 48:10, 49:8, 102:6, 105:11, 105:17, 105:21, 105:23 <b>lieu</b> 5:3
<b>J</b> <b>jacobs</b> 16:11, 17:6 <b>jaguar</b> 18:4 <b>job</b> 1:23 <b>join</b> 130:20, 131:2 <b>joined</b> 71:17 <b>joining</b> 73:6 <b>july</b> 1:20 <b>jumped</b> 67:16 <b>june</b> 93:15, 94:7 <b>junior</b> 33:20, 33:24, 34:3, 46:3 <b>justification</b> 43:19, 131:25 <b>justify</b> 37:23, 38:7, 39:2, 46:4, 47:6, 47:10, 48:3, 48:11, 49:13, 50:2, 50:24, 54:11, 58:4, 102:19, 106:12, 106:14, 106:23, 109:15, 109:21 <b>justifying</b> 48:14, 56:22, 102:18 <b>justin</b> 1:18, 2:1, 4:3, 4:8, 5:9, 6:2, 135:2 <b>juxtaposition</b> 108:14		<b>L</b> <b>labeled</b> 122:12 <b>lack</b> 99:11, 110:20 <b>laid</b> 102:17 <b>lake</b> 3:7 <b>land</b> 18:4 <b>large</b> 109:16 <b>last</b> 6:1, 10:14, 10:17, 10:20, 11:19, 20:14, 20:15, 21:6, 21:13, 21:15, 22:4, 22:11, 22:15, 26:25, 27:6, 27:12, 27:19, 29:14,	

<b>life</b> 13:25 <b>likelihood</b> 8:23, 9:2, 9:8, 13:21, 14:3, 14:15, 16:2, 16:6, 16:20, 19:5, 19:21, 20:9, 20:25, 21:7, 21:16, 21:20, 21:25, 22:4, 22:8, 22:13, 22:17, 22:25, 26:13, 27:13, 27:20, 28:2, 28:8, 31:10, 31:11, 31:15, 35:22, 36:13, 36:20, 37:4, 38:24, 40:16, 40:20, 41:2, 41:8, 41:19, 42:11, 43:21, 44:4, 44:10, 44:12, 44:14, 46:18, 47:1, 48:16, 49:6, 50:17, 51:19, 52:1, 53:6, 53:22, 53:25, 54:4, 54:5, 54:14, 54:24, 55:10, 55:16, 56:16, 111:8, 122:16, 122:22, 133:20 <b>likely</b> 57:4, 68:17, 69:7, 69:18, 69:21, 71:3, 71:12, 72:4, 129:8 <b>limited</b> 90:19 <b>line</b> 100:9, 112:19 <b>linkedin</b> 100:5, 100:7,	100:9, 100:10 <b>list</b> 10:18, 11:17, 20:14, 22:1, 27:10, 101:17, 101:20, 108:23, 113:11, 124:3, 129:9 <b>listed</b> 21:5, 21:13, 22:1, 80:8, 82:2, 82:3, 82:4, 83:18, 83:20, 84:1, 104:10 <b>listen</b> 123:18 <b>listing</b> 11:15, 29:24 <b>litigation</b> 7:20, 8:13, 8:17, 22:5, 22:9, 22:18, 23:13, 23:20, 26:12, 74:20, 74:23 <b>little</b> 24:3, 80:10, 110:24, 115:8, 119:10, 123:20 <b>location</b> 130:5, 130:6 <b>locations</b> 84:25, 126:19, 127:5, 127:6, 127:22, 127:24, 128:8 <b>logged</b> 101:8 <b>logical</b> 107:21 <b>logically</b> 102:15 <b>long</b> 6:19, 56:15, 98:17, 124:17 <b>longer</b> 54:18	<b>look</b> 32:12, 53:20, 68:24, 83:4, 83:5, 93:24, 96:12, 97:13, 97:17, 103:6, 108:2, 111:19, 112:16, 118:5, 118:7, 118:14, 120:11, 120:21 <b>looked</b> 64:7, 94:5, 100:19, 106:22, 125:21, 130:2, 130:8 <b>looking</b> 29:20, 44:23, 56:5, 56:11, 57:19, 60:2, 65:14, 101:6, 111:18, 118:23, 120:14, 123:14 <b>looks</b> 83:3, 100:4, 100:10, 117:22, 118:24, 119:18, 122:7, 124:11 <b>lost</b> 21:22, 98:13 <b>lot</b> 66:23, 77:7, 89:23, 90:23, 102:21, 108:2 <b>low</b> 45:21 <b>low-involvement</b> 66:21, 67:1, 67:7, 67:15, 67:21, 68:3, 71:14, 73:20 <b>lower</b> 68:18, 68:22 <b>luggage</b> 28:4, 36:3, 36:7, 37:19 <b>lumping</b> 77:6, 77:8 <b>lunch</b> 113:14, 114:2,	131:9 <hr/> <b>M</b> <hr/> <b>made</b> 43:7, 70:23, 95:16, 103:2, 118:24, 129:18, 129:25 <b>make</b> 49:24, 60:6, 60:9, 62:14, 81:24, 90:8, 93:21, 94:15, 95:15, 95:18, 97:13, 107:21, 113:6, 117:21, 119:9, 121:10 <b>makes</b> 53:9, 105:12, 120:10, 123:20 <b>making</b> 73:10, 73:25, 76:11, 90:11, 93:20, 109:24 <b>male</b> 121:5 <b>mall</b> 43:24 <b>manner</b> 101:13, 107:2, 109:25 <b>many</b> 9:7, 26:10, 26:13, 28:7, 40:9, 40:10, 69:19, 71:15, 95:6, 117:2, 117:4, 130:3, 130:9, 130:19, 131:1 <b>map</b> 120:18, 120:21, 121:21, 124:11 <b>march</b> 4:10 <b>mark</b> 10:1, 10:2, 16:2, 20:3,
---	--	--	--

20:7, 33:18, 33:19, 33:21, 33:23, 33:24, 34:2, 38:13, 38:17, 38:18, 39:1, 45:3, 46:3, 47:5, 47:8, 47:9, 48:2, 48:9, 48:17, 48:20, 49:2, 49:7, 49:13, 50:1, 50:13, 52:13, 91:13, 102:5, 121:9, 133:1 <b>marked</b> 10:5, 24:5, 52:10, 91:15, 91:17, 92:4, 93:4, 96:10, 96:24, 118:9, 118:12, 119:25, 120:1, 121:13 <b>market</b> 16:10, 60:12, 60:18, 60:24, 61:3, 61:10, 61:14, 61:15, 61:17, 61:20, 62:2, 62:5, 62:11 <b>marketing</b> 60:24, 61:17, 61:18, 62:19 <b>marketing-related</b> 60:25 <b>marketplace</b> 57:6 <b>marking</b> 10:2, 35:4, 96:23 <b>marks</b> 45:9, 45:21, 46:2, 46:6, 46:7, 46:14, 46:23, 47:20, 54:10, 101:25, 102:2, 102:23,	133:8, 133:11, 133:20 <b>material</b> 120:9 <b>materials</b> 29:21, 29:24, 30:5, 80:2 <b>matt</b> 34:12 <b>matter</b> 7:20, 11:13, 11:14, 11:25, 13:4, 23:20, 24:13, 28:3, 30:13, 40:8, 44:14, 45:4, 45:12, 45:23, 65:10, 67:24, 102:2, 102:14, 107:5, 131:18 <b>matters</b> 21:21, 21:25, 51:13, 131:19, 131:20, 132:6 <b>matthew</b> 3:19 <b>may-june</b> 4:16 <b>maybe</b> 65:22, 65:23, 109:3 <b>mean</b> 8:16, 12:2, 12:3, 12:4, 12:22, 12:25, 23:10, 23:12, 23:21, 25:20, 31:8, 31:9, 38:16, 39:5, 39:21, 47:19, 48:10, 53:9, 60:15, 63:10, 63:15, 65:19, 70:6, 75:20, 77:3, 83:10, 84:14, 94:10, 105:21, 105:23, 113:17, 120:19,	121:4, 121:5, 128:16 <b>meaning</b> 13:24, 21:3 <b>means</b> 61:3 <b>meant</b> 78:1, 118:21, 120:12 <b>measure</b> 16:8, 16:9, 19:24, 20:2, 20:6, 21:3, 31:15, 32:3, 32:10, 35:11, 44:13, 46:10, 46:12, 47:1, 50:12, 54:5, 122:16, 122:21 <b>measured</b> 13:24, 74:23, 122:21 <b>measures</b> 51:9, 54:14 <b>measuring</b> 38:24, 53:22, 53:25, 54:4, 55:10, 55:16, 56:16 <b>media</b> 109:24 <b>meet</b> 102:16, 110:25 <b>mention</b> 72:3, 79:13, 104:24 <b>mentioned</b> 45:6, 104:12, 117:1, 119:6, 124:4 <b>mercari</b> 11:10, 12:6, 12:9, 12:12 <b>mere</b> 48:20 <b>merits</b> 90:24 <b>met</b> 102:3, 102:4,	104:16, 104:21, 119:5 <b>methodologies</b> 31:13 <b>methodology</b> 54:12, 56:6, 56:19, 121:25 <b>metric</b> 49:12, 50:1, 50:6, 50:8, 50:9, 50:23, 51:1, 51:5 <b>metrics</b> 50:25 <b>might</b> 59:12, 59:22, 128:19 <b>mind</b> 41:16, 51:16 <b>mischaracterizes</b> 21:9, 27:2, 35:17, 39:8, 40:5, 45:19, 46:20, 55:21, 71:5, 71:7, 87:4, 104:17 <b>missed</b> 79:17 <b>misstates</b> 110:9, 118:1, 128:21, 129:2, 132:7 <b>mistake</b> 117:20, 118:24 <b>mistaken</b> 32:17 <b>misunderstood</b> 49:18, 49:23 <b>mmr</b> 6:17, 6:19, 6:21, 8:12, 8:21, 26:3, 29:8, 29:9, 29:15, 29:17 <b>mode</b> 114:15, 115:2, 115:4 <b>months</b> 125:13, 126:4,
--	--	--	--

126:10, 126:20, 133:9 <b>more</b> 9:10, 9:11, 11:8, 11:9, 11:16, 22:19, 22:21, 28:5, 28:11, 28:14, 28:15, 34:14, 40:13, 50:7, 50:8, 54:16, 65:4, 66:24, 68:16, 71:13, 72:11, 87:1, 89:7, 104:20, 107:10, 112:6, 116:14, 119:10 <b>morning</b> 5:25 <b>mortar</b> 126:11 <b>most</b> 11:11, 19:12, 57:4, 130:10 <b>motion</b> 23:14, 23:22, 90:25, 92:19, 92:25, 93:7 <b>much</b> 29:13, 29:14, 33:10, 54:18 <b>multiple</b> 51:24, 52:8, 86:20, 87:6, 109:16, 117:8 <b>must</b> 38:25, 102:6, 102:9, 104:4, 117:20 <b>myself</b> 60:23, 62:2, 62:25	107:22 <b>names</b> 32:15 <b>nature</b> 131:16 <b>necessarily</b> 10:25, 39:5, 88:9, 121:23 <b>necessary</b> 71:20, 114:14 <b>need</b> 34:9, 78:13, 89:11, 95:8, 121:23 <b>neither</b> 32:6, 136:10 <b>never</b> 24:17, 24:23, 25:4, 32:10, 34:2 <b>new</b> 96:23, 104:25, 105:9, 127:8, 128:1, 128:11 <b>news</b> 108:9, 108:10, 108:12, 111:21 <b>newspaper</b> 100:12 <b>next</b> 12:17, 13:25, 15:5, 15:9, 16:11, 17:10, 18:4, 18:22, 19:15, 66:16, 79:5, 100:11, 100:14, 104:2, 114:16, 121:9, 123:25 <b>nodding</b> 121:12 <b>none</b> 21:19, 23:25, 26:25, 27:6, 124:4 <b>nonlitigation</b> 75:4 <b>normal</b> 34:19, 57:6,	115:6 <b>normally</b> 127:22 <b>north</b> 19:15 <b>noted</b> 106:17, 112:4 <b>notes</b> 8:7, 21:4 <b>notice</b> 2:9 <b>number</b> 9:8, 26:23, 28:13, 29:25, 96:16, 109:16, 118:6, 118:25, 123:10 <b>numbered</b> 122:8 <b>numbers</b> 62:20, 64:10 <b>numeral</b> 80:10 <hr/> <b>O</b> <hr/> <b>object</b> 5:7, 89:12, 93:17, 98:11, 117:25, 125:18 <b>objected</b> 97:11 <b>objection</b> 19:25, 21:9, 21:18, 25:1, 25:7, 26:15, 26:19, 27:1, 27:8, 28:9, 31:24, 32:20, 33:8, 35:8, 36:16, 36:23, 37:24, 38:15, 39:8, 40:5, 40:17, 41:9, 41:15, 42:2, 42:20, 43:3, 43:14, 43:25, 44:6, 44:20, 45:18, 47:11,	48:5, 56:10, 58:15, 58:23, 59:3, 59:7, 59:14, 66:4, 71:5, 87:4, 88:21, 89:20, 90:11, 93:22, 93:23, 94:14, 94:16, 95:15, 95:16, 97:14, 98:22, 99:12, 99:15, 100:22, 104:17, 106:15, 107:8, 107:9, 107:13, 110:9, 126:13, 130:22, 131:4, 132:7, 133:3, 133:12 <b>objections</b> 27:15, 33:15, 38:9, 89:17, 90:8, 90:10, 90:15, 90:16, 90:23, 93:21, 94:9, 95:9, 97:16, 98:12, 107:11, 127:9, 128:2, 128:12 <b>objective</b> 125:22, 130:3, 130:8 <b>obtain</b> 77:21 <b>obtained</b> 127:8 <b>occurred</b> 31:6, 96:3 <b>occurrence</b> 109:9 <b>off-the-record</b> 6:24, 7:6 <b>offered</b> 14:7, 15:18, 16:17, 17:19, 54:2, 54:6 <b>offering</b> 45:15 <b>offhand</b> 28:10, 40:18
<hr/> <b>N</b> <hr/> <b>name</b> 6:1, 6:13, 15:4, 18:10, 40:14, 102:23,			

<b>officer</b> 136:3 <b>often</b> 68:20, 130:4 <b>okay</b> 9:25, 10:10, 10:24, 11:7, 11:10, 13:1, 16:7, 29:7, 35:24, 65:11, 67:14, 69:14, 77:16, 80:14, 81:23, 83:21, 93:23, 95:24, 98:5, 99:1, 99:3, 103:5, 119:22, 120:12, 120:14, 121:8, 125:12, 132:13 <b>oklahoma</b> 2:11, 136:20 <b>omit</b> 6:7 <b>once</b> 48:24, 86:21, 87:2, 114:8, 117:9, 128:13 <b>one</b> 7:22, 9:16, 11:3, 23:13, 26:11, 34:16, 34:22, 35:6, 35:15, 36:4, 41:16, 50:7, 50:8, 54:19, 59:12, 59:22, 62:20, 63:21, 65:4, 65:5, 80:21, 82:9, 84:19, 88:7, 95:24, 99:21, 100:4, 100:6, 100:11, 100:14, 101:19, 101:25, 102:2, 102:23, 103:2, 103:15, 104:12, 107:12, 107:14, 108:21,	108:24, 108:25, 109:1, 109:3, 109:7, 110:16, 110:22, 112:7, 113:4, 113:16, 113:23, 114:10, 114:18, 114:20, 114:22, 114:25, 115:1, 115:23, 116:1, 116:13, 116:20, 117:7, 119:6, 121:4, 121:5, 122:14, 122:20, 123:6, 124:12, 124:13, 124:18, 124:20, 126:16, 127:12 <b>one-room</b> 55:3, 55:18, 56:2, 56:9, 57:12, 57:22 <b>onerous</b> 95:6 <b>ones</b> 11:8, 84:1, 106:9 <b>ongoing</b> 11:25, 13:5, 133:21 <b>online</b> 57:5, 130:11, 130:16 <b>only</b> 31:3, 32:2, 35:22, 40:19, 56:15, 67:11, 75:12, 79:18, 85:9, 87:20, 90:13, 90:14, 103:11, 104:11, 109:10, 117:9, 117:16, 117:19 <b>open</b> 91:22, 97:21, 98:4, 120:11, 120:13, 126:6, 126:12 <b>opened</b> 97:10	<b>operated</b> 126:11 <b>operating</b> 19:16 <b>opine</b> 39:18 <b>opined</b> 39:5, 39:10 <b>opinion</b> 18:16, 23:6, 23:15, 23:19, 23:22, 26:2, 33:1, 34:10, 35:15, 35:20, 37:6, 37:20, 38:5, 44:15, 44:17, 45:2, 45:12, 45:14, 45:15, 45:20, 46:22, 58:18, 58:21, 59:1, 59:19, 59:21, 75:24, 133:15 <b>opinions</b> 25:21, 25:23, 26:7, 42:18, 42:23, 43:2, 43:12, 43:13, 65:10, 75:16, 90:1, 133:14, 133:24 <b>opportunity</b> 90:14 <b>opposed</b> 9:2, 9:4, 102:23, 123:21 <b>option</b> 123:22 <b>order</b> 11:5, 31:20, 54:11, 89:14, 91:25, 92:16, 92:19, 92:22, 94:18, 95:5, 97:19, 104:4, 134:6 <b>ordinary</b> 76:24, 77:3,	78:1 <b>organized</b> 123:20 <b>other</b> 8:5, 8:8, 9:3, 9:4, 14:8, 20:8, 23:15, 23:20, 23:21, 25:12, 25:19, 25:22, 32:1, 33:6, 35:4, 35:13, 35:15, 40:7, 42:23, 45:24, 50:21, 50:22, 51:4, 51:13, 62:1, 62:3, 62:11, 62:15, 64:19, 67:5, 67:8, 67:11, 70:6, 72:24, 73:16, 73:24, 74:9, 74:14, 74:15, 77:22, 79:14, 84:8, 84:19, 84:23, 85:1, 85:14, 86:14, 86:23, 100:1, 104:21, 104:23, 107:24, 108:1, 108:15, 110:16, 112:7, 113:6, 113:17, 113:23, 116:20, 116:23, 117:3, 117:4, 117:8, 117:11, 119:7, 122:25, 123:6, 124:4, 124:6, 124:12, 124:14, 124:17, 124:18, 124:20, 125:8, 126:17, 134:5 <b>others</b> 68:25, 72:5, 72:13, 72:17, 102:18 <b>otherwise</b> 45:13, 90:5,
---	---	--	---



136:12 <b>out</b> 25:21, 29:10, 29:14, 48:9, 65:23, 71:12, 77:23, 102:17, 112:21, 116:7, 117:22, 118:6, 125:12, 132:12 <b>outcome</b> 136:12 <b>outline</b> 57:2 <b>outside</b> 37:25, 43:25, 125:19, 126:13, 129:1, 129:3, 130:22, 133:3 <b>over</b> 20:5, 20:14, 21:15, 43:23, 49:20, 54:6, 59:13, 59:22, 69:16, 88:6, 88:8, 88:12, 88:14, 88:20, 123:8, 125:13, 125:16, 125:24, 126:3, 126:20, 132:12 <b>overly</b> 95:6 <b>own</b> 9:19, 9:20, 37:12, 39:23, 44:4, 53:10, 92:4 <b>owner</b> 12:4	44:24, 53:21, 54:25, 56:20, 57:20, 60:2, 66:14, 66:17, 78:22, 79:6, 80:1, 80:17, 83:17, 85:6, 85:11, 100:1, 100:14, 103:7, 108:5, 109:4, 109:7, 110:22, 111:14, 112:17, 113:11, 114:18, 115:13, 116:14, 118:15, 118:18, 118:19, 120:5, 132:5 <b>pages</b> 1:24, 56:15, 79:12, 96:17, 98:17, 109:2 <b>paid</b> 29:1 <b>pandemic</b> 125:15, 126:5, 126:10, 127:5, 127:25 <b>paper</b> 53:1 <b>paragraph</b> 29:25, 60:2, 60:3, 61:20, 62:15, 62:17, 64:20, 66:15, 67:12, 69:12, 69:13, 69:16, 69:17, 70:11, 70:13, 70:16, 70:23, 72:2, 72:3, 72:15, 78:21, 79:13, 80:1, 83:5, 83:15, 87:12, 106:9, 115:14, 116:4, 120:16, 124:24, 129:12, 129:22, 129:25 <b>paragraphs</b> 83:13	<b>pardon</b> 115:13 <b>part</b> 17:3, 17:6, 21:22, 23:8, 23:23, 37:20, 61:18, 65:20, 82:1, 84:9, 85:2, 85:13, 85:14, 87:23, 89:25, 97:6, 125:8, 127:14, 127:15, 129:20 <b>particular</b> 58:14, 66:10, 87:15, 88:1, 95:22, 101:23, 103:19, 115:10 <b>parties</b> 36:5, 71:16, 108:14, 133:8, 133:21, 136:11 <b>party</b> 15:23, 36:8, 37:1, 76:5 <b>party's</b> 71:17 <b>past</b> 42:7, 62:12, 75:22 <b>paste</b> 115:3 <b>pasted</b> 79:6, 86:14, 87:12, 87:13, 110:17, 114:18 <b>pause</b> 53:13 <b>pdf</b> 9:17, 9:22 <b>penalties</b> 5:6, 5:15, 5:20 <b>pending</b> 7:2, 89:13, 92:22 <b>people</b> 43:24, 58:22, 59:2, 60:7,	67:9, 71:2, 73:21, 73:25, 76:24, 77:4, 78:1, 126:6, 126:21, 127:22 <b>percent</b> 72:11, 109:18, 117:22, 119:3, 130:16 <b>percentage</b> 9:8, 60:7, 109:20, 117:21 <b>perform</b> 15:15, 18:1, 18:11, 19:19, 20:20, 21:16, 36:13 <b>performed</b> 19:2, 20:22, 25:14, 26:14, 26:17, 27:13, 28:8, 41:24, 50:15, 74:9, 97:6, 97:7 <b>performing</b> 26:6, 29:2, 50:16, 74:10 <b>perhaps</b> 115:25 <b>peril</b> 95:20 <b>perjury</b> 5:6, 5:15, 5:20 <b>person</b> 59:22, 69:8, 69:22, 71:3, 71:22, 73:5, 88:23, 101:8, 127:23, 128:19 <b>personal</b> 24:16 <b>personally</b> 25:4 <b>perspective</b> 88:22, 88:24 <b>petitioner</b> 20:17 <b>pharmaceuticals</b> 17:11
--	---	--	--

<p><b>phd</b> 1:18, 2:1, 4:3, 4:8, 6:4, 135:2</p> <p><b>phone</b> 71:22</p> <p><b>phrase</b> 56:2, 56:3, 78:25, 83:16, 84:18, 98:7, 98:20, 104:2</p> <p><b>phrased</b> 127:17</p> <p><b>phrases</b> 83:8, 83:11, 83:12, 83:13, 83:22, 84:9, 84:23, 112:2</p> <p><b>phrasing</b> 53:12</p> <p><b>physical</b> 126:5, 126:11, 127:4, 127:5, 127:21, 130:5, 130:15, 132:2</p> <p><b>pivot</b> 24:3</p> <p><b>place</b> 34:12</p> <p><b>placement</b> 46:6</p> <p><b>places</b> 83:9</p> <p><b>plaintiff</b> 1:7, 3:2, 7:9, 7:15, 13:12, 14:14, 14:20, 16:18, 17:2, 17:4, 17:20, 17:22, 24:7, 28:19, 29:8, 29:15, 37:11, 40:2, 99:8, 99:20, 100:2, 100:7, 113:10, 132:25</p> <p><b>plaintiff's</b> 7:21, 14:14, 17:7, 19:3,</p>	<p>19:10, 25:13, 39:23, 96:11</p> <p><b>plan</b> 43:12, 88:11</p> <p><b>play</b> 85:13</p> <p><b>please</b> 5:2, 5:25, 6:1, 6:9, 14:25, 20:5, 36:18, 65:22, 119:10, 134:6, 134:8</p> <p><b>point</b> 15:6, 64:8, 69:12, 73:14, 90:11, 90:17, 90:22, 91:1</p> <p><b>points</b> 103:2</p> <p><b>poret</b> 4:9, 31:4, 31:14, 31:19, 42:23, 45:8, 45:10, 45:25, 72:10, 80:22, 81:24, 85:23, 89:7, 93:14, 94:7, 96:2, 97:6, 97:7, 102:7, 102:11, 104:14, 110:1, 115:15, 116:2, 116:9, 116:10, 116:15, 118:25, 120:23, 122:4, 122:9, 122:20, 123:24, 131:23, 132:19, 132:23, 133:15, 133:24, 133:25</p> <p><b>poret's</b> 10:4, 30:12, 30:15, 31:5, 31:12, 45:7, 45:20, 46:22, 63:22, 91:16, 96:11, 110:20, 115:9, 117:17,</p>	<p>118:5, 119:25, 129:24</p> <p><b>port</b> 30:11</p> <p><b>portray</b> 89:9</p> <p><b>possible</b> 47:4, 47:6, 57:2</p> <p><b>potential</b> 24:24, 25:5, 25:10, 25:25, 78:7</p> <p><b>practice</b> 64:14</p> <p><b>practices</b> 69:1</p> <p><b>predict</b> 43:10</p> <p><b>preexisting</b> 16:3</p> <p><b>premise</b> 126:25, 127:2, 127:4, 127:10, 127:15, 128:4, 128:13</p> <p><b>preparation</b> 30:17, 30:20</p> <p><b>prerequisite</b> 39:24</p> <p><b>present</b> 3:18, 43:12, 104:4</p> <p><b>presented</b> 36:14, 36:21, 41:20</p> <p><b>presently</b> 22:6</p> <p><b>preserves</b> 89:20, 90:10</p> <p><b>prevents</b> 114:15</p> <p><b>previous</b> 6:22, 49:18, 49:23, 101:7, 101:15, 113:8, 127:12</p> <p><b>previously</b> 7:4, 8:1,</p>	<p>91:15, 91:17, 96:10, 118:9, 118:12, 120:1</p> <p><b>primary</b> 16:9, 20:2, 20:6</p> <p><b>print</b> 9:23</p> <p><b>printout</b> 98:6</p> <p><b>prior</b> 7:3, 7:21, 11:13, 35:18, 40:6, 46:20, 50:16, 55:5, 55:9, 55:21, 71:8, 75:15, 77:25, 78:2, 78:11, 87:5, 110:9</p> <p><b>private</b> 115:2</p> <p><b>probably</b> 24:14, 31:17, 108:9, 112:23, 117:22, 120:9, 129:5</p> <p><b>problematic</b> 90:24</p> <p><b>problems</b> 34:14</p> <p><b>proceed</b> 95:20</p> <p><b>proceeding</b> 5:8, 15:22</p> <p><b>process</b> 23:17, 71:12, 95:15, 120:15</p> <p><b>produce</b> 110:15</p> <p><b>produced</b> 89:7, 94:6, 96:3</p> <p><b>product</b> 13:15, 103:13, 103:19, 103:21</p> <p><b>products</b> 18:5, 32:13,</p>
---	--	---	--

32:15, 32:18, 54:1 <b>professional</b> 77:22 <b>proofread</b> 25:24 <b>properly</b> 91:1 <b>protect</b> 95:8 <b>protective</b> 91:25, 92:16, 92:19, 92:22, 94:18, 95:5, 97:19 <b>provide</b> 16:14, 32:25, 36:20, 44:13, 58:18, 59:19, 62:24, 70:24, 85:20, 116:3, 121:3, 121:6, 122:5 <b>provided</b> 10:22, 11:23, 21:14, 26:7, 36:4, 41:6, 41:7, 47:17, 58:21, 59:1, 62:20, 85:15, 85:21, 116:8, 120:19, 120:24, 133:16 <b>provides</b> 43:5, 60:10, 104:20 <b>providing</b> 45:1, 109:10 <b>proximity</b> 54:10, 54:16, 54:19, 57:3, 57:18, 58:3, 100:20, 101:17, 101:21, 102:18, 102:19, 106:10, 107:4, 108:19, 109:8, 109:15, 109:17, 109:19,	109:22, 110:20, 110:21, 110:25, 111:6, 132:2, 132:3, 133:10 <b>psychology</b> 59:10, 59:18, 70:4, 74:5 <b>public</b> 76:25, 77:20, 78:2, 78:3 <b>published</b> 52:6 <b>punctuation</b> 26:1 <b>purchasing</b> 67:7 <b>purport</b> 57:2 <b>purpose</b> 90:20 <b>purposes</b> 24:17, 24:22, 25:3, 25:20, 25:23, 30:6, 64:3, 65:24, 75:10, 77:11, 78:11, 91:5, 91:6, 92:3, 92:9, 94:1, 115:20 <b>pursuant</b> 2:9 <b>put</b> 10:7, 66:18, 91:19, 96:9, 97:1, 116:23, 118:11, 120:3, 121:8, 123:9, 124:23 <b>putting</b> 11:14, 108:13 <hr/> <b>Q</b> <hr/> <b>qualifying</b> 63:23 <b>quarter</b> 133:16, 133:17 <b>question</b> 7:2, 21:11,	22:15, 25:2, 25:8, 26:10, 27:5, 33:7, 34:16, 35:16, 36:18, 38:2, 39:25, 47:15, 48:19, 49:19, 49:23, 51:3, 52:23, 53:13, 54:3, 58:24, 59:15, 60:16, 60:22, 61:1, 61:25, 63:23, 63:24, 65:23, 67:4, 69:11, 73:4, 73:18, 73:20, 74:3, 76:23, 80:9, 81:6, 82:12, 85:14, 94:13, 95:25, 96:7, 96:18, 98:13, 98:14, 115:19, 115:20, 115:22, 115:23, 115:24, 115:25, 122:17, 122:23, 123:12, 124:1, 126:8, 126:25, 127:3, 127:11, 127:17, 128:3, 128:14, 129:5, 129:17, 130:25, 131:17, 132:9, 132:17 <b>questioning</b> 90:20, 94:1, 94:22, 115:9 <b>questions</b> 11:4, 42:22, 47:4, 77:11, 84:16, 92:3, 94:25, 99:15, 115:8, 115:11, 115:16, 116:3, 122:16, 122:20, 123:1, 123:9, 125:7, 134:1, 134:5	<b>quick</b> 34:12, 97:13 <b>quite</b> 5:16, 34:13 <b>quote</b> 45:1, 53:22, 103:10, 104:24 <b>quoting</b> 69:15 <hr/> <b>R</b> <hr/> <b>ran</b> 80:11, 96:2, 98:7, 111:13, 111:14, 111:24, 111:25, 112:1, 112:25, 114:3, 115:2 <b>rather</b> 47:15, 52:23, 91:10, 103:20 <b>reach</b> 25:21, 95:2, 129:15 <b>reached</b> 129:25 <b>read</b> 7:2, 35:14, 35:23, 71:1, 135:3 <b>reading</b> 31:5, 129:11 <b>reads</b> 53:22 <b>real</b> 133:19 <b>realized</b> 30:22 <b>really</b> 34:8, 58:2, 60:22, 61:24, 92:13, 101:3, 120:11, 132:12 <b>reason</b> 9:16, 102:20, 108:21 <b>reasonably</b> 107:15, 107:17,
--	--	---	---

107:19 <b>reasonings</b> 43:13, 116:1 <b>reasons</b> 42:19, 43:1, 101:18, 102:19, 107:24, 108:1 <b>rebuttal</b> 4:14, 29:18, 91:5, 91:8, 94:8, 96:3 <b>recall</b> 7:17, 7:18, 15:3, 17:5, 17:9, 18:10, 22:19, 26:23, 28:17, 38:10, 40:7, 40:13, 42:7, 42:14, 49:9, 49:10, 49:25, 50:19, 50:22, 59:4, 59:25, 63:13, 63:25, 64:7, 64:14, 68:14, 75:2, 82:23, 83:1, 84:7, 84:15, 84:18, 84:22, 84:23, 85:1, 86:23, 87:1, 87:22, 88:3, 111:17, 112:5, 112:11, 112:13, 112:14, 112:17, 113:3, 114:21, 114:24, 115:5, 126:2 <b>recent</b> 11:9, 11:11, 47:7, 104:24, 105:8, 105:11 <b>recently</b> 89:7 <b>recognize</b> 52:19, 53:1, 53:5 <b>recognizes</b> 53:15	<b>recompute</b> 121:24 <b>record</b> 7:5, 8:9, 35:24, 49:25, 91:1, 95:18, 109:17, 113:24, 131:6, 134:6, 136:6 <b>records</b> 110:5, 110:7 <b>recreational</b> 18:5 <b>reduced</b> 136:8 <b>refer</b> 55:1, 87:11, 122:6, 122:9 <b>reference</b> 68:10, 73:14 <b>referred</b> 67:12, 132:17 <b>referring</b> 8:6, 38:20, 38:21, 38:22, 52:17, 56:4, 66:11, 68:6, 68:8, 70:19, 79:25, 115:24, 132:9 <b>reflect</b> 132:19 <b>reflected</b> 80:17, 81:4, 81:11, 82:24, 84:24, 114:17 <b>reflects</b> 10:21, 81:8 <b>refresh</b> 112:22 <b>regard</b> 35:22, 131:16 <b>regarding</b> 42:15, 45:2, 53:6, 53:7, 55:25, 60:6, 62:11, 67:6, 68:25, 70:3,	72:21, 76:7, 99:16, 102:17 <b>regardless</b> 48:17, 117:2, 117:3, 128:14 <b>regards</b> 73:20 <b>registrant</b> 16:1 <b>registration</b> 16:3 <b>related</b> 56:2, 59:9, 66:6, 66:7, 136:10 <b>relevant</b> 48:14, 132:22, 133:18, 133:22, 133:23, 133:25 <b>reliability</b> 64:5 <b>reliable</b> 44:10, 44:13, 111:4 <b>reliably</b> 46:19, 107:2 <b>relied</b> 39:23, 40:8, 46:25, 50:23, 51:6, 64:20, 67:18, 69:3, 72:14, 72:24, 73:8, 73:24, 75:23, 80:2, 130:2 <b>rely</b> 32:3, 32:11, 35:11, 45:12, 62:8, 62:13, 62:17, 69:10, 70:1, 73:9, 74:4, 75:9, 78:10, 101:4, 106:13, 129:15 <b>relying</b> 40:1, 50:21, 51:4, 65:9, 65:10	<b>remember</b> 14:22, 15:2, 15:23, 20:11, 27:12, 27:16, 27:18, 28:6, 41:12, 84:3, 86:6, 103:1, 112:7 <b>reopen</b> 90:19, 92:2, 93:25, 95:3 <b>reopened</b> 96:6 <b>repeat</b> 25:2, 27:5, 36:17, 54:3, 63:7, 65:22, 73:3, 96:7, 127:13 <b>rephrase</b> 76:20, 76:22 <b>reported</b> 1:25, 110:11 <b>reportedly</b> 19:7 <b>reporter</b> 2:10, 4:15, 5:2, 5:4, 5:13, 5:18, 5:22, 6:12, 6:15, 14:24, 20:4, 21:22, 22:2, 22:21, 27:25, 30:11, 32:24, 33:2, 33:21, 34:11, 34:17, 36:10, 39:14, 46:12, 46:15, 49:20, 52:7, 78:14, 86:2, 86:5, 119:8, 119:13, 121:12, 131:11, 132:11, 132:14, 132:16, 134:4, 136:1, 136:3, 136:20 <b>reports</b> 28:7, 41:6,
---	--	---	---

41:7, 96:2 <b>represent</b> 36:8, 97:25, 98:5 <b>representation</b> 99:2 <b>representative</b> 71:18, 71:22, 77:4 <b>representing</b> 98:23, 98:24 <b>requested</b> 121:1 <b>requests</b> 91:11 <b>required</b> 47:14 <b>requirement</b> 54:9, 100:21 <b>requirements</b> 47:5 <b>requisite</b> 40:3 <b>research</b> 46:1, 46:9, 62:11, 65:12, 65:25, 66:7, 67:8, 67:25, 68:8, 73:16, 76:10, 89:2 <b>reserve</b> 45:11 <b>resolve</b> 107:9 <b>respect</b> 76:13 <b>responded</b> 123:9 <b>respondent</b> 116:12, 116:16, 117:2, 117:5, 117:8, 122:11, 122:12, 123:3, 123:4, 123:19, 123:23, 124:2, 124:8, 124:9, 125:3, 125:5 <b>respondent-by-re-</b> <b>spondent</b> 116:11	<b>respondents</b> 72:12, 116:19, 116:22, 117:16, 117:17, 118:3, 118:6, 118:17, 118:25, 119:5, 122:14, 125:1, 125:11 <b>response</b> 31:3, 60:11, 91:11, 119:12, 123:22, 124:5, 124:6 <b>responses</b> 116:7, 122:15, 122:20, 124:23, 124:25 <b>responsible</b> 131:23, 131:24 <b>rest</b> 125:12 <b>restate</b> 58:24, 88:17 <b>result</b> 56:7, 87:3, 88:20, 98:1, 99:4, 99:6, 99:7, 99:19, 99:22, 101:6, 108:8, 108:25, 113:7, 114:16, 117:11, 124:10, 131:21 <b>results</b> 46:7, 53:16, 54:11, 62:12, 79:6, 85:9, 85:15, 85:18, 85:21, 85:24, 86:7, 86:15, 86:21, 87:12, 88:5, 88:13, 89:8, 98:20, 100:20, 101:4, 101:15, 106:22, 107:1, 107:16, 107:18, 108:6, 108:11, 108:16,	108:20, 109:4, 109:13, 110:15, 110:22, 111:16, 111:19, 111:22, 113:10, 113:12, 113:18, 114:19, 116:14, 116:20, 117:3, 117:4, 117:7, 117:9, 119:7, 122:4, 122:8, 123:6, 124:7, 124:12, 124:14, 124:20, 129:10, 131:13, 131:21, 132:3, 132:10, 132:18, 132:22 <b>retail</b> 51:10 <b>retain</b> 101:15 <b>retained</b> 7:9, 7:12, 12:1, 12:6, 14:10, 15:12, 20:17 <b>retrieve</b> 10:8 <b>retrieved</b> 64:15, 87:16 <b>revealing</b> 76:5 <b>revenue</b> 51:10 <b>reverse</b> 11:8, 31:11, 31:15, 31:19, 31:23, 32:6, 32:19, 33:5, 34:5, 34:23, 35:7, 35:12, 131:1 <b>review</b> 8:7, 9:18, 30:17, 89:6, 108:4 <b>reviewed</b> 29:21, 29:24,	30:4, 30:9, 45:7, 81:16, 90:1, 111:2, 116:8 <b>reviewing</b> 30:20 <b>revise</b> 31:2 <b>right</b> 15:25, 18:1, 19:9, 20:18, 21:8, 21:17, 22:13, 23:1, 23:11, 24:14, 24:19, 24:25, 26:25, 27:3, 27:14, 28:20, 29:8, 40:22, 41:16, 42:9, 44:5, 44:19, 45:11, 45:17, 47:23, 48:4, 50:3, 50:18, 51:16, 53:12, 53:17, 54:2, 54:12, 54:21, 55:6, 55:11, 55:20, 57:8, 61:3, 61:6, 61:10, 64:21, 70:8, 70:14, 71:23, 77:13, 79:2, 79:7, 79:20, 80:6, 81:8, 82:7, 82:16, 82:20, 83:8, 83:25, 84:4, 84:20, 85:10, 85:16, 88:25, 90:8, 92:16, 94:3, 98:18, 99:9, 99:20, 99:24, 100:7, 103:14, 103:22, 103:23, 103:25, 104:6, 104:9, 104:16, 105:1, 110:17,
---	---	--	---



111:5, 112:3, 112:6, 112:7, 114:9, 116:25, 117:13, 119:20, 123:15, 124:20, 129:10, 129:19, 133:21 <b>rimowa</b> 28:4, 36:4, 36:6, 38:4, 39:3, 39:11, 40:22, 41:13, 43:22 <b>role</b> 6:23 <b>roman</b> 80:10 <b>room</b> 8:3, 91:20, 96:10, 97:2, 118:13, 121:9 <b>rover</b> 18:4 <b>row</b> 112:23, 122:11 <b>rule</b> 90:21 <b>rules</b> 95:4 <b>run</b> 80:17, 81:4, 81:10, 93:14, 93:18, 94:7, 111:12, 111:14, 115:4, 131:10 <b>running</b> 114:6 <hr/> <b>S</b> <hr/> <b>said</b> 13:16, 31:14, 31:19, 34:7, 40:2, 43:7, 44:17, 45:25, 49:22, 52:1, 52:5, 54:17, 60:22, 63:8, 64:20, 75:18,	79:9, 81:7, 83:13, 84:6, 84:11, 86:4, 87:15, 102:13, 103:2, 103:3, 104:4, 104:7, 104:12, 104:14, 104:21, 109:2, 110:4, 114:5, 114:10, 117:15, 118:18, 120:8, 129:8, 131:19, 136:7 <b>sales</b> 51:9 <b>salt</b> 3:7 <b>same</b> 21:18, 25:7, 26:19, 27:8, 27:15, 32:16, 32:18, 33:15, 36:23, 38:9, 41:15, 42:2, 59:3, 66:4, 72:2, 74:3, 77:12, 77:15, 83:16, 88:21, 92:6, 93:3, 93:5, 94:9, 97:4, 97:15, 97:16, 98:22, 111:15, 111:21, 112:9, 112:12, 113:10, 113:11, 121:18, 127:9, 128:2, 128:12, 130:25, 131:4, 132:4, 133:8, 134:9, 135:4 <b>sanctionable</b> 95:14 <b>satisfied</b> 106:8, 106:22, 107:7, 107:20 <b>satisfy</b> 39:24, 49:7, 100:20, 101:16,	107:13 <b>satisfying</b> 40:2 <b>saved</b> 86:10, 120:10 <b>saw</b> 64:10 <b>say</b> 8:20, 12:1, 12:4, 16:9, 21:23, 31:7, 32:1, 32:13, 35:10, 36:17, 38:16, 38:17, 44:9, 45:1, 46:9, 47:8, 48:9, 52:24, 58:17, 65:4, 66:5, 66:6, 69:3, 69:5, 69:17, 71:2, 75:21, 75:22, 76:1, 76:16, 77:4, 78:6, 82:10, 82:16, 85:11, 86:3, 89:4, 93:19, 99:10, 99:11, 101:2, 103:9, 103:18, 111:11, 116:21, 116:25, 129:1, 129:3, 129:14 <b>saying</b> 16:1, 57:1, 70:18, 70:21, 81:14, 81:16, 92:6, 92:10, 93:5, 93:12, 96:17 <b>says</b> 12:1, 29:20, 53:19, 82:18, 85:6, 100:8, 100:9, 102:7, 104:24, 108:6, 110:24, 118:16 <b>scenario</b> 71:11, 71:14	<b>scenarios</b> 32:5, 56:21, 57:1, 57:2, 57:7, 57:12, 57:14, 57:15 <b>scope</b> 37:25, 44:1, 125:19, 126:14, 130:22, 133:3 <b>screen</b> 9:18 <b>seal</b> 136:15 <b>searchable</b> 123:23 <b>searched</b> 80:25, 82:18, 83:6, 83:22, 84:4, 84:19, 85:7, 85:11, 85:19, 87:6, 110:12, 112:2, 113:22, 116:22 <b>searches</b> 4:12, 46:5, 55:20, 56:23, 79:14, 79:19, 79:23, 79:25, 80:4, 80:9, 81:18, 82:7, 82:10, 82:11, 82:13, 82:15, 84:16, 86:13, 86:16, 86:20, 87:1, 89:6, 93:14, 93:18, 94:7, 97:5, 97:7, 101:7, 109:16, 109:18, 110:16, 111:25, 112:10, 112:25, 113:4, 114:3, 114:4, 114:12, 131:24, 132:20 <b>searching</b> 63:16, 80:7, 80:22, 81:18 <b>second</b> 9:18, 99:7,
--	--	--	---

99:18, 102:8, 103:10, 108:5, 120:20, 121:20 <b>secondary</b> 13:24, 21:3 <b>section</b> 54:23, 55:4, 55:6, 55:7, 55:12, 55:16, 56:3, 56:6, 56:14, 56:16, 57:20, 57:24, 67:5, 69:14, 115:12, 115:15 <b>see</b> 29:10, 29:21, 32:14, 44:25, 53:23, 53:24, 55:4, 55:7, 56:2, 57:9, 60:5, 65:12, 65:25, 66:13, 68:5, 69:14, 69:24, 69:25, 72:16, 77:24, 79:3, 79:15, 80:5, 81:23, 83:6, 83:22, 85:17, 86:20, 87:16, 97:8, 98:8, 98:15, 98:18, 98:21, 99:1, 99:3, 99:5, 99:6, 99:21, 99:25, 100:3, 100:4, 100:8, 100:13, 100:16, 103:8, 103:14, 103:17, 105:2, 105:4, 111:15, 111:16, 111:20, 111:22, 112:20, 118:20, 119:15, 119:16, 121:6, 121:22, 122:18, 123:7, 131:13 <b>seeing</b> 32:8, 45:24,	47:22, 47:25 <b>seek</b> 71:12 <b>seem</b> 109:23, 110:24 <b>seems</b> 22:7, 45:21, 72:11, 100:11, 108:8 <b>seen</b> 29:11, 32:2, 32:9, 35:10, 35:14, 47:8, 93:14, 94:13, 94:20, 94:25, 96:2 <b>select</b> 71:2, 117:7, 124:9, 129:8 <b>selectable</b> 124:11 <b>selected</b> 117:5, 117:8, 117:11, 123:4, 123:6, 124:2, 124:6, 124:13, 124:17, 125:6 <b>selecting</b> 69:1, 69:6, 119:6 <b>self</b> 59:6 <b>send</b> 9:17, 119:17 <b>senior</b> 33:19, 33:23, 34:3, 38:20, 38:22, 39:1, 39:5, 39:19, 40:3, 46:2, 48:17, 48:20 <b>sense</b> 53:9, 105:12, 107:21, 114:14 <b>sent</b> 29:14, 29:19, 52:12, 121:16, 121:19	<b>sentence</b> 54:19, 78:24, 79:3, 103:10, 103:15, 104:19, 129:11 <b>separately</b> 119:24 <b>sequentially</b> 10:3 <b>service</b> 103:19 <b>services</b> 24:25, 25:6, 54:1, 54:6, 65:14, 65:17, 66:3, 67:10, 67:19, 68:2, 68:13, 71:18, 74:25, 75:6, 76:8, 76:17, 76:19, 76:20, 77:1, 77:6, 77:12, 77:13, 77:23, 78:4, 78:9, 125:16, 125:23, 126:22, 133:2 <b>set</b> 106:18, 136:14 <b>sets</b> 82:16 <b>several</b> 41:10, 46:5, 56:21, 101:18 <b>share</b> 60:12, 60:18, 60:24, 61:3, 61:10, 61:14, 61:15, 61:18, 61:20, 62:2, 62:5, 62:11, 65:7 <b>shared</b> 72:12 <b>sharing</b> 9:22 <b>sheet</b> 121:18, 121:20,	135:7 <b>sheets</b> 121:17 <b>shelf</b> 32:13 <b>shop</b> 67:9, 77:20 <b>shoppers</b> 54:20, 54:24 <b>shopping</b> 65:16, 66:2, 67:19, 68:1 <b>short</b> 89:13, 94:18, 95:5, 97:19 <b>shorthand</b> 2:10, 136:1, 136:20 <b>should</b> 12:4, 16:9, 56:14, 79:24, 82:15, 89:24, 90:5, 90:21, 101:2, 101:22, 107:15, 109:8, 110:1, 114:11, 119:1 <b>shouldn't</b> 90:2 <b>show</b> 89:8, 91:4, 94:6, 109:7 <b>showed</b> 123:24 <b>shows</b> 98:18, 98:19 <b>side</b> 14:8, 20:8, 23:14, 23:20, 23:21 <b>side's</b> 23:15 <b>sign</b> 71:21, 128:18, 128:19 <b>signature</b> 10:13, 135:12 <b>signature-d2yvl</b> 136:16
--	---	---	---

<b>signed</b> 28:7, 30:3, 36:15, 36:22, 42:4, 42:10, 49:4, 71:17, 126:21, 135:7 <b>significance</b> 16:10, 20:7 <b>significant</b> 25:19 <b>signing</b> 26:20, 73:1, 73:6, 73:21, 74:24, 75:5, 76:13, 76:25, 78:3, 128:1, 128:11 <b>similar</b> 32:15, 60:22, 62:12 <b>simply</b> 40:1, 47:25, 48:7, 48:8 <b>simultaneous</b> 49:17, 70:12, 76:21, 80:15, 104:1, 123:16, 127:20 <b>since</b> 6:21, 7:3, 30:5, 45:6, 67:15, 111:12, 111:15 <b>single</b> 120:5 <b>sir</b> 5:25, 70:11, 73:18, 81:17, 82:12, 134:2 <b>sit</b> 41:12, 84:6, 85:5 <b>sitting</b> 7:25, 40:21 <b>situation</b> 50:5, 50:8, 50:15, 66:25, 67:1, 68:20, 	132:19, 133:19 <b>situations</b> 57:5 <b>small</b> 120:11 <b>sold</b> 54:1 <b>solely</b> 129:9 <b>some</b> 10:24, 22:6, 31:3, 46:8, 47:4, 51:11, 58:16, 76:9, 108:4, 108:9, 113:4, 113:22, 114:12, 115:8, 115:11, 129:23 <b>someone</b> 62:24, 89:2, 89:4, 113:7 <b>something</b> 32:14, 73:8, 79:17, 89:24, 102:15, 110:1, 118:22 <b>somewhat</b> 23:18, 63:5, 63:9 <b>somewhere</b> 86:10 <b>sorry</b> 5:16, 6:12, 11:16, 14:24, 20:4, 21:22, 22:21, 25:2, 27:25, 30:11, 32:24, 33:21, 36:10, 49:20, 54:3, 63:6, 65:15, 69:11, 69:13, 73:3, 79:24, 83:4, 84:10, 86:2, 88:17, 92:21, 98:13, 108:25, 119:18, 119:23, 123:15, 127:10, 	131:11, 132:11 <b>sort</b> 49:11, 64:18, 88:11, 105:13, 105:14, 121:25 <b>sound</b> 16:4 <b>sounds</b> 128:25 <b>source</b> 60:10, 61:11, 62:20, 62:22, 62:23, 63:12, 64:6, 64:10, 68:11, 70:1, 70:18, 70:21, 71:1, 71:10, 73:23, 111:4 <b>sources</b> 64:19, 69:3, 76:11 <b>south</b> 3:6 <b>speak</b> 58:16, 71:3, 119:9 <b>speaking</b> 69:8, 69:22, 93:21, 98:12 <b>speaks</b> 44:21 <b>specific</b> 11:16, 55:25, 61:19, 62:20, 103:20, 104:5, 105:6 <b>specifically</b> 9:1, 67:23, 68:15, 73:21, 75:12, 76:13, 115:5 <b>specified</b> 86:24 <b>specify</b> 80:23 <b>speculate</b> 128:23 <b>speculating</b> 129:18 	<b>speculation</b> 43:4, 44:7, 100:24, 126:23, 132:8, 133:13 <b>speed</b> 87:24 <b>spell</b> 6:1 <b>spelling</b> 26:1, 36:4 <b>spending</b> 28:23 <b>spent</b> 28:19 <b>spoke</b> 49:21 <b>spot</b> 78:15, 78:17 <b>spreadsheet</b> 4:11, 4:19, 120:5, 120:10, 120:22, 121:17 <b>squirt</b> 13:19, 14:18, 14:19, 16:23, 16:24, 17:3, 17:4, 17:8, 17:23, 18:20, 19:11, 19:13, 19:14, 37:8, 41:21, 42:1, 42:12, 51:21, 52:3, 53:16, 54:12, 55:2, 55:7, 55:13, 55:19, 55:24, 56:8, 56:9, 56:22, 57:4, 57:15, 57:16, 57:21, 57:22, 57:23, 57:25, 58:1, 58:4, 100:21, 103:11, 106:12, 106:14, 106:23, 107:5, 107:10, 111:8 <b>staff</b> 69:9, 69:23, 
---	---	---	--

71:4 <b>stand</b> 45:5, 45:13, 79:5, 100:6, 125:2 <b>standard</b> 64:14, 109:8 <b>standards</b> 38:23, 54:13, 110:25 <b>standing</b> 89:20, 99:14 <b>standpoint</b> 133:11 <b>start</b> 14:25, 20:5, 69:16, 102:22, 120:6, 122:17, 123:14, 132:11 <b>starting</b> 53:21 <b>starts</b> 54:25, 115:13, 118:15 <b>state</b> 2:10, 3:6, 5:25, 134:5 <b>stated</b> 62:17 <b>statement</b> 42:17, 45:5, 45:13, 105:5, 130:1 <b>states</b> 1:1 <b>static</b> 88:6 <b>stenographically</b> 136:8 <b>steps</b> 64:15 <b>still</b> 8:18, 11:25, 45:13, 47:9, 72:3, 86:10, 128:3, 132:25 <b>stipulate</b> 5:3	<b>stop</b> 103:22, 103:24 <b>store</b> 32:12, 79:25, 85:13 <b>story</b> 108:10 <b>straining</b> 119:13 <b>strategy</b> 6:17, 6:19, 8:12 <b>street</b> 3:6 <b>stricken</b> 90:17 <b>strike</b> 14:4, 129:16 <b>struggle</b> 22:7 <b>studied</b> 75:5, 76:6, 76:8 <b>studies</b> 68:24 <b>study</b> 65:3 <b>subject</b> 74:7, 89:13, 90:16, 91:24, 92:16, 92:18, 92:19, 92:23, 92:24, 96:6, 97:16, 97:18 <b>submit</b> 27:12, 40:10 <b>submitted</b> 10:11, 11:1, 11:11, 21:6, 23:7, 24:4, 27:19, 27:23, 28:1, 28:2, 38:4, 40:15, 42:16 <b>subparagraphs</b> 29:25 <b>substance</b> 96:19	<b>successful</b> 24:1 <b>sue</b> 136:19 <b>sufficient</b> 37:22, 38:6, 38:14, 38:25, 39:7, 39:19, 46:3, 48:10, 48:21, 48:25, 49:8, 49:13, 50:2, 57:3, 58:3, 89:22, 102:6, 104:14, 105:11, 106:12, 107:3, 107:25, 108:21, 109:6, 110:21 <b>sufficiently</b> 47:9 <b>suggest</b> 103:10 <b>suggests</b> 115:25 <b>suitcases</b> 28:5 <b>suite</b> 3:6, 3:14, 6:10 <b>summarized</b> 56:20 <b>support</b> 70:24, 72:8, 72:10, 107:4 <b>supports</b> 70:22, 75:23 <b>sure</b> 42:21, 44:11, 49:24, 51:15, 51:22, 56:13, 60:15, 61:1, 63:9, 77:3, 119:9, 127:10 <b>surveys</b> 8:13, 8:22, 9:2, 9:3, 9:4, 9:6, 26:13, 32:9, 35:23, 41:5, 51:19,	52:21, 52:25, 53:7, 53:8, 55:2, 55:8, 55:14, 55:24, 56:1, 57:11, 62:18, 67:17, 67:23, 68:24, 74:14, 74:15, 74:17, 75:4, 75:15, 78:6, 111:9 <b>swann</b> 51:18, 53:14, 100:18, 101:16, 101:19, 102:1, 102:17, 103:4, 106:9, 106:21, 111:1, 111:3 <b>swearing</b> 5:3 <b>switch</b> 115:7 <b>synonymous</b> 77:11 <hr/> <b>T</b> <hr/> <b>take</b> 34:12, 34:18, 78:15, 95:24 <b>taken</b> 7:1, 35:25, 78:18, 106:18, 113:25, 131:7, 136:4, 136:7 <b>talk</b> 24:4, 24:6, 24:11, 24:15, 25:8, 25:9, 25:13, 25:16, 25:21, 55:5, 77:12, 78:24, 85:9, 85:18, 87:10, 123:18 <b>talked</b> 24:17, 24:23, 25:4, 84:25 <b>talking</b> 25:18, 50:14,
---	---	--	---

71:18, 71:21, 77:21, 81:20, 94:17, 113:1, 118:15, 128:4, 128:7 <b>talks</b> 53:25, 54:4, 54:9, 54:13, 54:15 <b>technical</b> 6:25, 7:7 <b>technician</b> 3:19 <b>telephone</b> 69:8, 69:9, 69:23, 71:3 <b>tell</b> 6:8, 9:5, 23:12, 75:24, 76:6 <b>ten</b> 28:11, 28:14 <b>tend</b> 68:21 <b>term</b> 63:8, 82:22, 85:23, 102:5, 102:9, 102:13, 107:19, 109:5, 110:23, 113:8 <b>terminology</b> 103:12, 103:20, 103:21, 104:5, 105:7 <b>terms</b> 43:11, 62:19, 81:18, 82:16, 85:1, 85:12, 90:24, 103:13, 133:14 <b>test</b> 46:4, 48:4, 50:3, 118:3, 122:25 <b>tested</b> 116:15, 122:5, 122:9 <b>testified</b> 10:19, 11:12,	11:19, 21:6, 21:15, 39:22, 40:12, 67:22 <b>testify</b> 10:25, 11:21 <b>testifying</b> 26:21, 42:4, 91:2, 92:11 <b>testimony</b> 5:5, 5:14, 5:19, 12:20, 12:22, 12:25, 13:3, 21:10, 23:25, 27:2, 35:18, 39:9, 40:6, 45:19, 46:16, 46:21, 55:22, 71:8, 87:5, 90:16, 91:9, 110:10, 118:1, 128:21, 129:2, 132:8, 135:4, 135:6, 136:6, 136:7 <b>tests</b> 55:6 <b>texts</b> 8:7 <b>th</b> 79:10, 87:16, 111:14 <b>thank</b> 5:22, 6:15, 22:2, 33:2, 46:15, 86:5, 99:17, 106:24, 119:14, 134:2, 134:3 <b>themselves</b> 58:17, 80:5 <b>thereafter</b> 136:8 <b>thing</b> 26:1, 103:1 <b>things</b> 31:3, 31:6, 51:12, 54:20 <b>thinking</b> 43:17, 74:21	<b>third</b> 99:22 <b>thought</b> 66:18 <b>three</b> 79:18, 100:1, 133:9 <b>through</b> 9:20, 11:3, 27:10, 51:10, 57:8, 104:25, 108:3, 108:4, 120:16, 121:25, 122:19, 122:24 <b>throughout</b> 10:3, 51:25 <b>tim</b> 78:14, 89:10, 93:16, 94:10, 99:10 <b>time</b> 8:12, 8:21, 11:3, 22:4, 22:7, 22:16, 22:19, 27:12, 27:19, 28:19, 28:22, 28:24, 29:9, 29:14, 30:5, 87:20, 88:6, 88:8, 88:12, 88:14, 88:20, 93:10, 94:5, 95:25, 108:2, 111:12, 111:15, 112:9, 112:12, 112:25, 125:14, 127:16, 131:9, 134:2 <b>times</b> 41:10, 51:24, 52:8, 53:10, 87:7 <b>timothy</b> 3:12 <b>title</b> 51:23 <b>titled</b> 55:12	<b>titletown</b> 20:15, 20:17 <b>today</b> 29:13, 30:18, 40:12, 40:21, 41:12, 42:14, 67:22, 84:6, 85:5, 90:2, 112:5, 131:9, 131:18, 131:21, 132:18, 132:22, 133:1, 133:8 <b>together</b> 77:8, 116:22, 117:12 <b>took</b> 64:15 <b>top</b> 11:9, 98:18, 112:19, 112:20, 118:19 <b>topic</b> 19:7, 53:2, 59:1, 59:6, 59:21, 60:25, 61:13, 61:14, 61:15, 61:19, 65:8, 67:9, 73:17, 111:5, 111:6 <b>topics</b> 8:23, 53:3, 76:9 <b>total</b> 29:16, 116:7, 117:15, 117:16, 118:16, 118:24, 124:19, 125:9 <b>totality</b> 35:21 <b>town</b> 6:13 <b>trade</b> 13:14, 15:3, 15:4, 37:18, 37:21, 38:5, 39:6, 39:11, 39:12, 39:14,
--	--	---	--

39:19, 40:3 <b>trademark</b> 4:15, 8:14, 8:17, 9:3, 9:5, 12:3, 12:9, 12:13, 12:15, 12:18, 13:11, 13:12, 14:1, 14:12, 14:20, 15:7, 15:10, 15:20, 15:24, 16:12, 17:12, 17:15, 18:6, 18:8, 18:23, 19:17, 31:20, 31:21, 32:5, 34:21, 35:6, 37:16, 39:6, 52:6, 108:7 <b>traffic</b> 128:9 <b>trailer</b> 17:14 <b>trailers</b> 17:14 <b>training</b> 74:7 <b>transaction</b> 128:20 <b>transcript</b> 4:7, 5:7, 10:6, 30:9, 30:12, 30:15, 45:7, 52:11, 91:18, 96:25, 110:4, 118:10, 120:2, 121:14, 136:5 <b>transcription</b> 135:5 <b>travelers</b> 36:7, 36:11, 36:25, 38:4, 40:22 <b>treating</b> 77:10 <b>trial</b> 10:19, 10:25, 12:25, 37:14	<b>true</b> 5:5, 5:14, 5:19, 128:14, 135:4, 136:6 <b>try</b> 9:22, 23:14, 91:23, 97:15 <b>ttab</b> 15:10, 20:16 <b>tuesday</b> 1:20 <b>tug-of</b> 108:7 <b>turn</b> 118:14 <b>twice</b> 125:5 <b>two</b> 32:14, 32:17, 34:22, 35:6, 68:5, 77:6, 79:14, 82:15, 82:16, 98:17, 104:9, 104:19, 106:11, 108:14, 109:1, 112:18, 121:17, 123:23, 133:20, 133:21 <b>two-room</b> 55:3, 55:18, 55:23, 56:3, 56:9, 57:13, 57:23 <b>type</b> 9:3, 9:4, 50:8, 57:12, 57:13, 82:1, 105:23, 106:1, 132:1 <b>typed</b> 81:14, 83:1 <b>types</b> 34:22, 35:6, 47:22, 55:2, 72:25, 77:22 <b>typewriting</b> 136:9 <b>typical</b> 57:6, 109:9,	109:21 <b>typically</b> 16:1, 102:9, 115:3 <hr/> <b>U</b> <hr/> <b>unbiased</b> 101:14, 106:16, 107:2, 109:25 <b>unclear</b> 114:9 <b>uncleared</b> 114:11 <b>under</b> 5:6, 5:14, 5:19, 23:15, 31:21, 51:2, 57:6, 57:16, 88:13, 136:9 <b>understand</b> 6:3, 8:11, 57:24, 60:23, 61:24, 65:12, 65:21, 90:12, 90:18, 116:4, 116:5, 120:8 <b>understanding</b> 24:2, 34:21, 35:1, 38:23, 76:3, 108:11, 110:3, 132:25 <b>unfavorable</b> 109:14 <b>union</b> 1:5, 1:12, 7:10, 24:8, 24:11, 24:15, 24:18, 24:24, 25:5, 65:14, 65:17, 66:2, 67:10, 67:19, 68:2, 68:12, 69:6, 69:9, 69:18, 69:23, 71:2, 71:4, 71:17, 71:21, 72:1, 72:7, 73:2, 73:6,	74:11, 74:24, 75:6, 76:7, 76:14, 76:20, 76:25, 77:6, 77:13, 78:8, 79:1, 81:13, 81:15, 82:22, 83:23, 83:24, 84:4, 84:13, 84:20, 85:7, 85:8, 85:10, 85:19, 85:22, 85:25, 86:11, 87:11, 87:19, 98:8, 98:21, 99:5, 99:8, 99:19, 99:23, 100:2, 100:8, 100:15, 101:24, 105:15, 105:18, 106:1, 108:7, 125:16, 126:6, 126:12, 126:19, 126:22, 127:6, 128:1, 129:9, 130:4, 130:9, 130:21, 131:3, 131:12, 132:5 <b>unions</b> 68:15, 73:22, 77:7, 78:4, 83:24, 127:18, 128:6, 130:15, 130:18 <b>united</b> 1:1 <b>unless</b> 79:17 <b>until</b> 54:25, 94:18, 120:6 <b>upheld</b> 90:15 <b>url</b> 83:2, 100:10, 112:23 <b>use</b> 8:16, 13:19,
--	---	--	--



14:17, 16:22, 17:22, 19:11, 38:7, 39:2, 55:18, 58:22, 59:2, 59:12, 59:22, 60:7, 63:24, 64:24, 65:13, 66:1, 67:2, 67:9, 67:13, 69:18, 72:6, 77:14, 82:25, 84:17, 89:12, 91:23, 92:6, 93:5, 101:22, 103:19, 107:4, 112:9, 112:12, 115:20, 130:5, 133:7, 133:21 <b>usefulness</b> 53:15 <b>user</b> 33:24, 38:20, 38:22, 48:20, 103:18 <b>user's</b> 39:1, 39:19, 40:3, 46:3 <b>users</b> 39:5, 61:10 <b>uses</b> 103:12 <b>using</b> 39:24, 49:25, 53:16, 54:5, 63:1, 63:15, 63:17, 63:20, 77:15, 79:1, 81:20, 82:4, 84:13, 84:14, 84:17, 84:21, 85:2, 87:19, 88:23, 89:3, 101:21, 112:2, 114:12, 115:10, 133:1 <b>utah</b> 1:2, 3:7, 83:24	<b>v</b> <b>vague</b> 25:1, 38:15, 41:9, 42:13, 42:20, 43:3, 43:14, 47:16, 48:5, 48:13, 50:11, 52:24, 53:4, 53:18, 56:10, 58:15, 58:23, 59:7, 59:14, 59:24, 60:14, 60:20, 63:5, 63:9, 64:12, 64:25, 65:18, 71:24, 73:11, 74:13, 75:1, 75:7, 75:11, 76:15, 77:2, 78:5, 80:12, 80:19, 80:23, 81:5, 82:8, 86:4, 86:17, 88:2, 89:1, 105:20, 106:3, 115:16, 126:1, 130:12, 133:13 <b>value</b> 106:19 <b>vancott</b> 3:5, 7:21, 25:13 <b>variety</b> 8:23 <b>various</b> 47:22 <b>ventura</b> 6:10 <b>verified</b> 5:9 <b>verify</b> 118:23 <b>versus</b> 11:10, 12:18, 13:25, 15:6, 15:9, 16:11,	17:10, 17:14, 18:4, 18:22, 19:15, 20:15, 38:4, 40:22, 60:8, 62:6, 68:18, 73:19 <b>vertical</b> 100:9 <b>vet</b> 64:9 <b>vetting</b> 64:19 <b>via</b> 95:7 <b>view</b> 100:17 <b>vii</b> 80:3, 80:5, 80:10, 80:17, 80:23, 81:4, 81:8, 81:11, 81:25, 82:10, 82:25, 83:4 <b>viii</b> 80:3, 82:2, 82:3, 82:6, 82:10, 82:13, 83:5 <b>virtually</b> 1:19, 2:2 <b>visual</b> 37:18 <b>volume</b> 51:9 <b>w</b> <b>waive</b> 89:16, 95:9 <b>waiver</b> 90:23 <b>waives</b> 89:22 <b>walk</b> 120:16, 126:7 <b>walked</b> 108:4 <b>walking</b> 47:21	<b>want</b> 9:1, 11:3, 24:3, 31:7, 33:12, 33:18, 36:2, 47:4, 78:20, 90:3, 91:5, 94:2, 94:15, 95:11, 95:19, 99:12, 108:22, 115:7, 116:4, 119:15, 119:16, 121:24, 128:24, 133:9 <b>wanted</b> 31:1, 127:23 <b>warning</b> 120:4 <b>way</b> 5:8, 21:5, 30:23, 35:15, 47:19, 57:24, 58:7, 77:15, 84:19, 89:5, 92:1, 97:15, 106:1, 109:15, 109:24, 110:5, 112:7, 113:16, 116:25, 120:6, 120:10, 123:19, 126:16 <b>ways</b> 63:19, 75:21 <b>we'll</b> 8:5, 10:2, 34:18, 52:13, 113:13, 134:9 <b>we're</b> 26:24, 72:3, 83:21, 89:16, 94:16, 95:20, 101:6, 103:25, 113:1 <b>we've</b> 10:2, 24:5, 111:2 <b>wealth</b> 73:12 <b>website</b> 81:12, 81:13
--	--	---	--

<b>websites</b> 80:5, 80:8, 80:24, 80:25, 81:16, 81:18, 82:24 <b>weedon</b> 3:19 <b>went</b> 27:10, 121:25, 125:7 <b>weren't</b> 129:18 <b>whereof</b> 136:14 <b>whether</b> 15:4, 39:10, 44:18, 46:2, 48:15, 49:4, 49:12, 50:1, 50:19, 58:2, 58:3, 67:18, 67:25, 72:6, 84:19, 87:1, 87:2, 88:5, 94:25, 101:5, 106:16, 109:17, 109:20, 112:23, 114:24, 115:1, 115:5, 116:13, 116:16, 125:23, 126:5, 126:9, 126:10, 133:10, 133:19, 133:22 <b>whole</b> 23:8, 23:23, 90:17, 95:14 <b>willing</b> 89:16, 90:19, 92:2 <b>within</b> 46:7, 73:15 <b>without</b> 63:20, 71:18, 76:5, 101:5 <b>witness</b> 5:4, 5:9, 5:16, 5:21, 6:14, 15:1, 21:10,	21:24, 22:23, 27:2, 30:12, 32:25, 33:23, 35:17, 36:11, 39:9, 39:16, 40:6, 46:14, 49:22, 90:13, 91:2, 91:4, 91:22, 92:11, 94:3, 95:17, 97:17, 97:21, 119:11, 132:13, 132:15, 134:3, 136:14 <b>word</b> 104:3, 115:20 <b>words</b> 113:6 <b>work</b> 6:8, 6:17, 9:23, 24:6, 24:10, 24:23, 25:14, 25:17, 29:1, 29:5, 29:8, 29:15, 33:17, 58:10, 58:19, 64:3, 65:11, 77:25, 78:2, 78:11, 84:9, 85:3, 87:23, 89:5 <b>worked</b> 6:19, 6:21, 7:3, 7:20 <b>working</b> 22:6, 22:8, 25:19 <b>world</b> 133:19 <b>wouldn't</b> 31:17, 52:24, 58:7, 58:17, 129:3, 133:9, 133:14, 133:24 <b>wrap</b> 113:13 <b>write</b> 129:14	<b>written</b> 22:10, 22:12, 22:16, 26:18, 36:14, 36:21, 41:4, 41:20, 41:25, 51:18, 105:4 <b>wrote</b> 31:16 <b>Y</b> <b>yeah</b> 11:17, 12:23, 25:3, 25:9, 34:15, 44:23, 58:25, 60:11, 61:24, 65:24, 69:13, 71:7, 73:4, 74:3, 78:16, 81:7, 84:6, 88:18, 92:9, 94:22, 97:12, 98:17, 100:6, 104:11, 106:15 <b>year</b> 7:4, 7:13, 64:16, 94:7, 133:17 <b>years</b> 10:20, 11:19, 20:15, 21:7, 21:15, 22:11, 22:20, 22:22, 26:25, 27:6, 28:5, 40:9, 40:10, 40:13, 42:8 <b>yesterday</b> 98:7 <b>you-all</b> 134:5 <b>yourself</b> 13:17, 18:1, 40:2, 46:1, 49:7, 57:10, 58:5, 58:9, 58:13, 59:11,	60:12, 60:17, 62:23 <b>Z</b> <b>zeroing</b> 87:25 <b>zoom</b> 95:7 <b>\$</b> <b>\$20,000</b> 29:17 <b>.</b> <b>.2734</b> 3:16 <b>.8900</b> 3:8 <b>0</b> <b>00028</b> 1:7 <b>004596</b> 96:16 <b>01</b> 7:1 <b>07</b> 36:1 <b>1</b> <b>1</b> 113:25 <b>10</b> 4:14, 7:1, 35:25, 79:10, 87:16, 111:14, 122:8, 123:4, 124:22, 125:6 <b>100</b> 9:10, 130:16 <b>10011</b> 122:13, 123:8 <b>100319</b> 124:9 <b>105</b> 116:4, 120:16, 124:24 <b>11</b> 36:1, 122:8,
--	---	---	--

123:5, 124:22, 125:6 <b>118</b> 4:9 <b>119</b> 4:11 <b>12</b> 29:25, 78:18, 78:19, 80:1, 124:1 <b>1200</b> 3:6 <b>121</b> 4:19 <b>1237</b> 136:21 <b>13</b> 62:17 <b>136</b> 1:24 <b>14</b> 60:2, 78:22 <b>144</b> 116:7, 116:19, 116:24, 117:13, 117:21, 117:23, 119:3, 119:4, 120:17, 124:23, 125:9 <b>15</b> 4:13, 93:15, 111:14, 114:18 <b>16501</b> 6:10 <b>18</b> 44:24, 125:13, 126:4, 126:10, 126:20 <b>1800</b> 3:14 <b>19</b> 1:7 <b>1:-cv--dak-jcb</b> 1:7 <hr/> <b>2</b> <hr/> <b>2</b> 113:25	<b>20</b> 131:7 <b>2014</b> 6:21, 7:3 <b>2019</b> 4:16, 51:18 <b>2021</b> 1:20, 4:10, 4:13, 4:18, 79:10, 87:16, 136:15 <b>215</b> 3:6 <b>23</b> 66:14 <b>24</b> 119:3 <b>26</b> 4:18 <b>27</b> 1:20, 112:17 <b>29</b> 131:7 <hr/> <b>3</b> <hr/> <b>3</b> 131:7, 134:10 <b>3-5-0</b> 122:23 <b>30</b> 78:18, 91:9, 96:17 <b>300</b> 3:14, 117:16, 117:19, 117:22, 118:3, 118:16, 118:21, 119:2 <b>303.473</b> 3:16 <b>32</b> 115:13 <b>320</b> 122:18, 123:12 <b>33</b> 115:13, 134:10 <b>330</b> 122:18, 122:19, 123:1, 123:9,	125:7 <b>35</b> 60:2, 60:3, 61:20, 62:15, 64:20, 67:12, 78:21, 83:5, 83:15, 87:12 <b>350</b> 122:23, 123:1, 124:1, 125:7 <b>37</b> 10:15, 113:25 <b>384704</b> 1:23 <hr/> <b>4</b> <hr/> <b>40</b> 62:4, 62:16, 62:21, 62:23, 64:6, 64:11 <b>41</b> 79:13, 83:5, 83:14 <b>42</b> 78:19, 79:13, 83:6, 83:14, 103:6, 106:9, 107:7, 107:14 <b>45</b> 113:25 <b>4625</b> 96:16 <b>48</b> 117:22 <b>49</b> 44:24 <hr/> <b>5</b> <hr/> <b>50</b> 9:11 <b>51</b> 35:25 <b>52</b> 4:15 <b>5289</b> 3:15 <b>53.7</b> 72:11	<b>56</b> 1:21 <b>58</b> 7:1 <hr/> <b>6</b> <hr/> <b>6-</b> 4:13 <b>600</b> 116:7, 117:15, 117:18, 117:20, 117:24, 118:21, 119:1 <b>601</b> 6:10 <b>62</b> 4:9, 68:10, 68:12, 70:19, 70:22, 71:1, 118:9, 118:12, 118:13 <b>63</b> 68:6 <b>64</b> 68:7 <b>67</b> 4:11, 119:25, 120:1, 120:3, 120:13, 120:17, 121:18 <b>679</b> 53:21, 54:25, 57:20 <b>680</b> 103:7 <b>682</b> 56:20 <b>683</b> 55:1 <b>69</b> 66:15, 70:16, 129:22 <hr/> <b>7</b> <hr/> <b>7-</b> 4:18 <b>72</b> 69:13, 69:17,
--	---	--	---

70:11, 70:13, 70:23, 72:3, 72:15 <b>73</b> 4:12, 91:15, 91:17, 91:19, 96:10 <b>74</b> 10:4 <b>75</b> 4:14, 10:2, 10:5, 10:8, 24:5 <b>76</b> 4:15, 52:10, 52:13, 100:19, 103:4 <b>77</b> 4:17, 96:24, 97:1, 97:9, 99:16, 106:11, 106:14, 106:16, 106:18, 107:25, 129:12, 129:25 <b>78</b> 4:19, 121:10, 121:13	<b>9th</b> 64:15, 136:15	
<b>8</b>		
<b>801.531</b> 3:8 <b>80302</b> 3:15 <b>84111</b> 3:7 <b>85</b> 122:6		
<b>9</b>		
1:21, 7:1 <b>91</b> 4:12 <b>91436</b> 6:11 <b>93</b> 115:14 <b>96</b> 4:17		